Supreme Court of the United States

OCTOBER TERM, 1967

No. 236

MILES EDWARD HAYNES, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CR-3-703

THE UNITED STATES

vs.

MILES EDWARD HAYNES

For U.S.:

Melvin M. Diggs
B. H. Timmins, Jr.

For Defendant:

Ernie Figari, Ct. Aptd.

STATISTICAL RECORD

J.S. 2 mailed 3-31-66
J.S. 3 mailed Apr. 30, 1966
Violation
Title 26
Sec. 5821 5851 5861
Illegal possession of firearms
(3 counts)

DOCKET ENTRIES

DATE 1966		
March	4	Filed WAIVER OF INCIDENT.
March	4	Filed INFORMATION.
March	4	Filed defendant's MOTION TO DISMISS.
March	4	Filed defendant's MOTION TO SUPPRESS EVIDENCE.
March	4	Filed defendant's MOTION FOR SPEEDY TRIAL.
March	4	Bench warrant ordered issued in open court and bond set at $500.00.

PROCEEDINGS

DATE 1966	
March 4	Issued WARRANT for arrest of defendant and given to U. S. Marshal.
March 10	Filed defendant's MOTION to suppress statement of defendant & Brief.
March 10	Filed defendant's MOTION TO DISMISS counts 1 and 3.
March 10	Filed deft's MOTION TO DISMISS count 2.
[fol. 2]	
March 10	Filed defendant's MOTION TO SUPPRESS evidence and brief.
March 17	Filed Return of Subpoenas to Testify executed on March 10, 1966 as to Vertia Mae Lofton, Rudolph Page and Gertrude Glass all by personal service.
March 17	Filed Return of Subpoenas to Testify executed by personal service on March 11, 1966, as to W. T. Hilburn and unexecuted as to Mary Cabell Mathis.
March 25	Enter ORDER denying motions of the defendant to dismiss all counts of the information; to suppress evidence because of an allegedly unlawful arrest; and to suppress statement of the defendant because of an alleged failure to inform him of his right to counsel STH
March 28	Filed Commissioner's Papers
March 28	Entered plea of GUILTY to count 2 only. Counts 1 & 3 are dismissed.
April 7	Filed JUDGMENT & COMMITMENT, sentenced 4 years to the custody of the Attorney General and shall become eligible for parole at such time as the board of parole may determine. Upon motion of the United States Attorney, counts 1 and 3 are dismissed. STH
April 7	Two certified copies to U. S. Marshal.
April 14	Filed defendant's MOTION for leave to appeal in forma pauperis and AFFIDAVIT of Miles Edward Haynes, the defendant.
April 14	Filed ORDER granting leave to prosecute appeal in forma pauperis. STH
April 14	Filed NOTICE OF APPEAL.
April 14	Statement of docket entries, notice of appeal and order granting leave to prosecute appeal in forma pauperis mailed to Circuit Court of Appeals, New Orleans.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CR No. 3-703

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

MILES EDWARD HAYNES, DEFENDANT

INFORMATION—filed March 4, 1966

The United States Attorney charges:

COUNT I

Title 26, United States Code, Sections 5851 and 5861,
That on or about February 8, 1965, in Dallas, Dallas County, Texas, and in the Dallas Division of the Northern District of Texas, MILES EDWARD HAYNES, defendant herein, knowingly and unlawfully possessed a firearm as defined by Section 5848(1), Title 26, United States Code, to wit, a weapon made from a 410 gauge single shot shotgun with a barrel length of 12 5/16 inches, stock cut off, overall length 20⅜ inches, Serial No. 759885, which firearm had been made in violation of Section 5821, Title 26, United States Code, in that the making tax of $200.00 had not been paid prior to the making of this firearm, and in that, prior to the making of such firearm, there was a failure to file a written declaration of intention to make such firearm, as required.

COUNT II

Title 26, United States Code, Sections 5851 and 5861,
That on or about February 8, 1965, in Dallas, Dallas

County, Texas, and in the Dallas Division of the Northern District of Texas, MILES EDWARD HAYNES, defendant herein, knowingly and unlawfully possessed a firearm as defined by Section 5848(1), Title 26, United States Code, to wit, a weapon made from a 410 gauge single shot shotgun with a barrel length of 12 5/16 inches, stock cut off, overall length 20⅜ inches, Serial No. 759885, which firearm had not been registered with the Secretary of the Treasury or his delegate, that is, the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C., as required by Section 5841, Title 26, United States Code, and Section 179.98 of Title 26 Code of Federal Regulations, Part 179.

[fol. 4] COUNT III

Title 26, United States Code, Sections 5821 and 5861.

That on or about February 1, 1963, in the vicinity of Dallas, Dallas County, Texas, and in the Dallas Division of the Northern District of Texas, MILES EDWARD HAYNES, defendant herein, did knowingly and unlawfully make a firearm as defined by Section 5848(1), Title 26, United States Code, to wit, a weapon made from a 410 gauge single shot shotgun with a barrel length of 12 5/16 inches, stock cut off, overall length 20⅜ inches, Serial No. 759885, and did fail to pay the tax on the making of this firearm, in advance of the making of the firearm, as required by law.

/s/ Melvin M. Diggs
United States Attorney

/s/ B. H. Timmins, Jr.
Assistant United States Attorney

_____
(Date)

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CR. 3-703

[File Endorsement Omitted]

[Title Omitted]

TO THE HONORABLE JUDGE OF SAID COURT:

MOTION TO DISMISS COUNT II—filed March 10, 1966

Now comes MILES EDWARD HAYNES, Defendant in the above entitled and numbered cause, and moves this Court to dismiss Count II of the information lodged against Defendant by the United States in the above-numbered and styled cause, and for reason would show the following:

I

That Section 5851 of Title 28, United States Code, which charges an offense with respect to Section 5841 is unconstitutional and therefore cannot support Count II of the information.

II

That Defendant, in lieu of the above, has been denied due process under the Fifth Amendment and his right to a fair trial.

WHEREFORE, premises considered, the Defendant now prays that Count II of the information be dismissed.

Respectfully submitted,

/s/ Ernest E. Figari, Jr.
3600 First National Bank Bldg.
Dallas, Texas - RI 1-3401

[fol. 6]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CR. No. 3-703

[File Endorsement Omitted]

[Title Omitted]

ORDER DENYING DEFENDANT'S MOTIONS—March 25, 1966

On this the 11th day of March, 1966, came on to be heard the Motions of defendant MILES EDWARD HAYNES to:

(a) Dismiss all counts of the information.
(b) Suppress evidence because of an allegedly unlawful arrest, and
(c) Suppress statement of the defendant because of an alleged failure to adequately inform defendant of his right to counsel and because of the denial of due process.

The defendant appeared in person and with his attorney, Ernest E. Figari, Jr. Assistant United States Attorney Bailey F. Rankin appeared for the United States. After both parties announced ready the Court proceeded to hear the evidence and the arguments of counsel.

The Court finds:

(1) That neither the motion to dismiss the Information nor the arguments advanced by counsel in support of it state sufficient grounds for dismissal of the Information.

(2) That on the date of arrest of Miles Edward Haynes on or about February 8, 1965, the arresting officer had both the right and the duty under the law to arrest him and take the sawed off shotgun from his person.

(3) That prior to the making of any statement or confession to the Federal Bureau of Investigation, the defendant was fully and adequately informed of all of his rights under the Constitution of the United States, includ-
[fol. 7] ing his right to counsel and was not denied due process under the Fifth Amendment of the United States Constitution.

THEREFORE, all motions of the defendant identified herein above are overruled.

ENTERED this 25th day of March, 1966.

SARAH T. HUGHES
United States District Judge

APPROVED AS TO FORM AND SUBSTANCE:

BAILEY F. RANKIN, Assistant
United States Attorney

ERNEST E. FIGARI, JR.
Attorney for Defendant

[fol. 8]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AT DALLAS

No. CR 3-703

[File Endorsement Omitted]

UNITED STATES OF AMERICA

v.

MILES EDWARD HAYNES

JUDGMENT AND COMMITMENT—April 7, 1966

On this the 28th day of March, 1966 came the attorney for the government and the defendant appeared in person and with counsel appointed by the Court and being advised of the nature of the charge and of his rights, did waive in open court and in writing prosecution by indictment and consents to be prosecuted by information.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offense of possession of illegal firearm which had not been registered with the Secretary of the Treasury or his delegate in violation of Title 26 U.S.C., Sections 5851 and 5841 as charged in count 2 of the information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the imposition of sentence is withheld and thereafter on the 7th day of April, 1966:

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his

authorized representative for imprisonment for a term of four (4) years and that defendant shall become eligible for parole at such time as the board of parole may determine.

Upon motion of the United States Attorney counts 1 and 3 are hereby dismissed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to: .....

/s/ Sarah T. Hughes
United States
District Judge

(Signed) ..... (By) .....
Clerk Deputy Clerk

[fol. 9]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CR. 3-703

[*File Endorsement Omitted*]

[Title Omitted]

NOTICE OF APPEAL—filed April 14, 1966

NOTICE is hereby given that MILES EDWARD HAYNES, Appellant and Defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from a judgment upon a conviction of an offense named under 26 U.S.C. § 5851, to wit: possession of an unregistered firearm. Said Judgment having been entered upon said conviction on April 7, 1966, by the United States District Court for the Northern District of Texas, Dallas Division, further said Judgment imposes upon Defendant-Appellant a sentence of four (4) years to be served by Defendant-Appellant in a Federal Correctional Institution. The name of the Federal Correctional Institution where Defendant-Appellant is confined is Federal Correctional Institution, Texarkana, Texas. This appeal is made through Defendant-Appellant's court-appointed counsel, Ernest E. Figari, Jr., whose address is 3600 First National Bank Building, Dallas, Texas.

DATED: 14 day of April, 1966.

/s/ Ernest E. Figari, Jr.

[fol. 10]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23595

MILES EDWARD HAYNES, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of Texas

---

OPINION—February 14, 1967

Before BROWN, COLEMAN, and AINSWORTH, Circuit Judges.

COLEMAN, Circuit Judge: Appellant was charged with a violation of 28 U.S.C.A., § 5851,[1] as follows:

---

[1] § 5851. Possessing firearms illegally

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this action the defendant is

[fol. 11] That on or about February 8, 1965, in Dallas, Dallas County, Texas, and in the Dallas Division of the Northern District of Texas, MILES EDWARD HAYNES, defendant herein, knowingly and unlawfully possessed a firearm as defined by Section 5848 (1), Title 26, United States Code, to wit, a weapon made from a 410 gauge single shot shotgun with a barrel length of 12 5/16 inches, stock cut off, overall length 20⅜ inches, Serial No. 759885, which firearm had not been registered with the Secretary of the Treasury or his delegate, that is the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C., as required by Section 5841, Title 26, United States Code, and Section 179.98 of Title 26 Code of Federal Regulations, Part 179.

He moved to dismiss on the ground that "Section 5851, of Title 28, United States Code, which charges an offense with respect to Section 5841 [2] is unconstitutional. [fol. 12] . . ." The motion was overruled. Haynes thereupon pleaded guilty, was sentenced to four years imprisonment, and has perfected this appeal.

A guilty plea is a waiver of all nonjurisdictional defects and defenses and admits the facts charged, *White* v. *Beto*, 5 Cir., 1966, —— F.2d ——; *Law* v. *Beto*, 5 Cir., 1966, —— F.2d ——. Where, prior to his guilty plea, a

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shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

[2] § 5841. Registration of persons in general

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

defendant appropriately raises the unconstitutionality of the applicable statute, an appeal, directed to that issue, is not foreclosed, *Ex Parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1879); *Rice* v. *United States*, 5 Cir., 1929, 30 F.2d 681; *United States* v. *Urey*, 2 Cir., 1939, 106 F.2d 28.

Insofar as it requires an individual to incriminate himself, Section 5841 has at least four times been held unconstitutional.[3]

This Court aligned itself with those decisions in *Lovelace* v. *United States*, 357 F.2d 306 (1966). We there held invalid an indictment which charged the possession of a sawed off shotgun "which had not been registered by the defendant. . . .". We said:

> The offense charged includes not only the possession of a firearm, but *also the failure to register by the defendant himself* [emphasis added]. Such registration would clearly incriminate him, as he would [fol. 13] thereby have to admit that he was in possession of a firearm which he did not acquire in compliance with Section 5851. . . . The indictment by requiring proof that the defendant himself had not registered the gun has applied Section 5851 in an unconstitutional manner [357 F.2d at 309]."

The Court discussed the *Russell* case, cited in footnote 3, as to the unconstitutionality of Section 5841 and made known its familiarity with cases holding Section 5851 to be Constitutional. The Constitutionality of Section 5851, however, was not expressly passed upon as that was unnecessary to the determination of the issue under consideration.

The appellant here, enjoying the vigorous assistance of able appointed counsel, strongly attacks the Constitutionality of Section 5851. He argues that the Section cannot stand because it is inseparable from Section 5841, and, in any event, violates the privilege against self-incrimination guaranteed by the Fifth Amendment.

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[3] *Russell* v. *United States*, 9 Cir., 1962, 306 F.2d 402; *Dugan* v. *United States*, 8 Cir., 1965, 341 F.2d 85; *United States* v. *Fleish*, 227 F.Supp. 967 (E.D. Mich., 1964); *McCann* v. *United States*, 217 F. Supp. 751 (D. Colo., 1963).

As to the first ground, we quote from appellant's brief:

> "It is the Appellant's contention that, since Section 5841 is unconstitutional and void, that is, has no legal existence, Section 5851, being inseparable from Section 5841, is likewise unconstitutional, and should be held invalid.
>
> * * * *
>
> [fol. 14] "Thus the reference by Section 5851 to Section 5841 has the effect of incorporating a void.
>
> * * * *
>
> "Section 5841 is so essential to Section 5851 that the latter cannot operate without the former * * *"

As to the second ground, appellant says "* * * non-registration by 'any one' must, by the very provisions of Section 5841, necessarily include the present possessor of the firearm".

These arguments are not bereft of plausibility. Nevertheless, it cannot be ignored that Section 5851 has at least eight times been held Constitutional.[4] We have been cited, and we find, no case to the contrary. We are presented no issue of choice as to the weight of authority—the decisions all sustain Constitutionality.

In one of the most recent decisions collated in Footnote 4, *Castellano* v. *United States*, on which certiorari was denied, the Court held as follows:

> "The National Firearms Act has been upheld as a valid exercise by Congress of its taxing power.

---

[4] *Castellano* v. *United States*, 10 Cir., 1965, 360 F.2d 852, *cert. denied*, 383 U.S. 949, 86 S.Ct. 1207, 16 L. Ed. 2d 211 (1966); *Taylor* v. *United States*, 10 Cir., 1964, 333 F.2d 721; *Sipes* v. *United States*, 8 Cir., 1963, 321 F.2d 174, *cert. denied*, 375 U.S. 913, 84 S. Ct. 208, 11 L. Ed.2d 150 (1963); *Frye* v. *United States*, 9 Cir., 1963, 315 F.2d 491, *cert. denied*, 375 U.S. 849, 84 S. Ct. 104, 11 L. Ed.2d 76 (1963); *Starks* v. *United States*, 9 Cir., 1963, 316 F.2d 45; *Capooth* v. *United States*, 238 F. Supp. 583 (S.D. Tex. 1965); *Hazelwood* v. *United States*, 208 F. Supp. 622 (N.D. Cal. 1962); *United States* v. *Forgett*, 6 Cir., 1965, 349 F.2d 601, *cert. denied*, 383 U.S. 926, 86 S. Ct. 929, 15 L. Ed.2d 845 (1966); *Mares* v. *United States*, 10 Cir., 1963, 319 F.2d 71.

[fol. 15] In the use of that power registration of the affected property or activity may be required. Russell does not deny the validity of the registration provision and says only that a prosecution may not be had thereunder. In the case at bar the offense is the possession—not the failure to register. The status of unlawful possession is created by the requirements of § 5841. The appellant was not forced into that status. He did not have to accept or acquire the gun. When he did so he became subject to the applicable statutory provisions; and the gun not having been registered, the offense was complete. His inability thereafter to register without self-incrimination does not defeat the charge or render the application of § 5851 violative of the Fifth Amendment."

The Judgment of the District Court is

AFFIRMED.

[fol. 16]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23595

D. C. Docket No. CR 3-703

MILES EDWARD HAYNES, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, COLEMAN, and AINSWORTH, Circuit Judges.

JUDGMENT—February 14, 1967

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate:

[fol. 17]

SUPREME COURT OF THE UNITED STATES

No. 1474 Misc., October Term, 1966

MILES EDWARD HAYNES, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 12, 1967

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1468 and placed on the summary calendar and set for oral argument immediately following No. 181.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 269458 16

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SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 236

MILES EDWARD HAYNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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Attorneys for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 236

MILES EDWARD HAYNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The district court filed no opinion. The opinion of the Court of Appeals (R. 11-15) is reported at 372 F.2d 651.

Jurisdiction

The judgment of the Court of Appeals (R. 16) was entered on February 14, 1967. The petition for writ of certiorari was filed on March 11, 1967, and was granted on June 12, 1967. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

Does the Fifth Amendment privilege against self-incrimination bar criminal conviction of a person under 26 U.S.C. §5851 for possession of a firearm that had not been registered as required by 26 U.S.C. §5841?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions directly applicable to this case are set forth below. Other related statutory provisions are reproduced in Appendix A, at p. 21.

United States Constitution, Amendment V: No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

United States Code, title 26, §5841: Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

United States Code, title 26, §5851: It shall be unlawful for any person to receive or possess any firearm which

has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

STATEMENT OF THE CASE

On March 4, 1966, an information was filed in the District Court for the Northern District of Texas charging petitioner, in separate counts, with three offenses under the National Firearms Act (R. 3-4). Only Count II of the information is now relevant. It charged:

> That on or about February 8, 1965, in Dallas, Dallas County, Texas, and in the Dallas Division of the Northern District of Texas, MILES EDWARD HAYNES, defendant herein, knowingly and unlawfully possessed a firearm as defined by Section 5848(1), Title 26, United States Code, to wit, a weapon made from a 410 gauge single shot shotgun with a barrel length of 12-5/16 inches, stock cut off, overall length 20⅜ inches, Serial No. 759885, which firearm had not been registered with the Secretary of the Treasury or his delegate, that is, the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D.C., as required by Section 5841, Title 26, United States Code, and section 179.98 of Title 26 Code of Federal Regulations, Part 179.

On March 10, 1966, the court-appointed attorney for petitioner moved to dismiss Count II of the information on the ground that 26 U.S.C. §5851, which charges an offense with respect to 26 U.S.C. §5841, is unconstitutional and could not support the challenged count of the information (R. 5). The trial court denied the motion on March 25th (R. 6-7). On March 28th petitioner pleaded guilty to Count II of the information and was sentenced to four years in prison (R. 8-9). At the same time Counts I and III of the information were dismissed by the court on motion of the United States Attorney (R. 9). The trial court granted leave to appeal *in forma pauperis* and appointed counsel to represent petitioner on appeal. A timely appeal was taken to the Court of Appeals for the Fifth Circuit, and that court, on February 14, 1967, affirmed the conviction (R. 16).

SUMMARY OF ARGUMENT

The provision of 26 U.S.C. §5841 requiring registration of firearms has been held unconstitutional by courts of appeals on grounds not challenged by the government. Those decisions are clearly right, since §5841 requires registration only by a possessor of a firearm that has been made or transferred in violation of federal law, and another statute, 28 U.S.C. §5851, makes it a crime to possess a firearm that has been made or transferred in violation of federal law. Thus only those persons who are violating §5851 are required to register under §5841, and registration is inevitably incriminating.

The present prosecution is under another clause of §5851 making it a crime to possess a firearm that has not been

registered under §5841. Since registration would be incriminating, the result is to punish the possessor for his refusal to incriminate himself. Such a result is inconsistent with the Fifth Amendment. The statute requires registration by every possessor, and the relevant Treasury Regulation makes it clear that a possessor must register unless the firearm is already registered "to him." Thus registration by some prior possessor does not remove the obligation on the present possessor to register, and it is only his failure to register that is involved in a prosecution under the registration clause of §5851.

It is unconstitutional to prosecute the possessor of a firearm under §5841 for failing to register it. It is equally unconstitutional to prosecute a person under §5851 for possession of a firearm that he has not registered under §5841.

ARGUMENT

Although the National Firearms Act was enacted by virtue of the taxing power, and upheld on that ground, *Sonzinsky* v. *United States*, 300 U.S. 506 (1937), it is clear that, as a Senate committee has since declared: "The primary purpose of that act was to make it more difficult for the gangster element to obtain certain types of weapons. The type of weapon with which these provisions are concerned are the types it was thought would be used primarily by the gangster-type element." S. Rep. No. 1303, 86th Cong., 2d Sess. (1960). This is a worthy goal, and no challenge is made here of the use of the taxing power to achieve it. However, this goal may not be attained by provisions that compel an individual to come forward and

confess his own guilt or face a criminal prosecution for his failure to do so.

The statutory framework of the National Firearms Act can be described as follows. "Firearm" is given a quite arbitrary definition, 26 U.S.C. §5848(1), intended to include, so far as possible, the kinds of weapons used by the criminal element, such as sawed-off shotguns or machine guns, while excluding those popular with the sportsman. A heavy tax is imposed on the making, 26 U.S.C. §5821, or transfer, 26 U.S.C. §5811, of a firearm as so defined.[1] Every person possessing a firearm is required to register, unless the firearm has been made, transferred, or imported in compliance with the provisions of the act. 26 U.S.C. §5841. It is declared to be unlawful to possess any firearm that has been made or transferred in violation of the other provisions of the act, or that has not been

[1] There are additional requirements under the making and transfer provisions of the aet besides the required payment of the corresponding tax. Under §5821, the person subject to the tax imposed by §5821(a) must: (1) declare in writing prior to making such firearm his intention to make a firearm; (2) affix to the original of such declaration the stamp described in §5821(d); (3) file the original declaration and a copy thereof; and (4) if the maker of the firearm is exempt from the tax, submit the report required by §5821(b) notifying the government of same.

Under the provisions applicable to a transfer of the firearm, the person transferring a firearm must: (1) execute a written order on an application form issued by the Secretary of Treasury as provided in §5814; (2) affix to such order a stamp as provided in §5813; (3) in case of exportation of the firearm, follow the procedure prescribed in §5844; (4) if the transfer is exempt under §5812(a), give notice of such exemption as provided by §5812(b); and (5) comply with the laws pertaining to assessment, collection, remission and refund of taxes, the engraving, issuance, sale, accountability, cancellation and distribution of tax-paid stamps, and "all other provisions of the internal revenue laws" not inconsistent with the provisions of Chapter 53, as referred to in §5846.

registered. 26 U.S.C. §5851. Finally any person who violates any of the requirements of the act is subjected to substantial criminal penalties. 26 U.S.C. §5861.

The registration provision of §5841, and the incorporation by reference of that provision in the possession or enforcement section, §5851, cannot be reconciled with the privilege against self-incrimination. The registration provision purports to reach "every person possessing a firearm," but the second sentence of §5841 states that registration is not required if the provisions of the act with regard to making or transfer were complied with when the possessor made the gun or acquired it by transfer. It is difficult to conceive of one possessing a firearm that he has not either made or acquired by transfer, especially in light of the expansive definition given to "transfer" for purposes of the act. 26 U.S.C. §5848(10).[2] Thus, in effect, §5841 requires registration only if the possessor has failed to comply with those portions of the act dealing with making or transfer. But §5851 makes it a crime to possess a firearm "which has at any time been transferred * * * or which has at any time been made" in violation of the making or transfer provisions. Therefore, only those persons whose possession of a gun would be a crime under §5851 are required to register under §5841.

Thus take the case of a person who has made a "firearm," as defined in the act. If he pays the tax and complies with the other procedures required by §5821, he has done all that federal law demands of him. He is not required to register under §5841, because of the exclusion from the

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[2] 26 U.S.C. §5848(10) provides that: The term "to transfer" or "transferred" shall include to sell, assign, pledge, lease, loan, give away, or otherwise dispose of.

registration requirement in the second sentence of that section. His possession is not unlawful under §5851, since the weapon was not made in violation of §5821, and registration was not required by §5841. If the maker then transfers the gun to someone else, and complies with the transfer provisions of §§5811–5814, again neither the maker nor the transferee are required to register under §5841 nor is the transferee's possession unlawful under §5851.

The case is very different if the maker has not complied with the requirements in §5821 about making firearms (and a similar analysis applies if a firearm is made in compliance with §5821 but later transferred without complying with the transfer provisions). In this instance since the maker is a "person possessing a firearm" within §5841, he is required by that section to register. He has also violated §5851 in two respects: he is the possessor of a firearm that has been made in violation of §5821, and he is the possessor of a firearm that has not been registered as required by §5841. If he registers he is no longer guilty of the second violation of §5851, but he confesses his guilt of possession of a firearm unlawfully made.

Registration of possession under §5841 not only provides "a link in the chain of evidence," *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951), by which an individual might be convicted under §5851, but it furnishes the government with a prima facie case, since under the last sentence of §5851 "possession shall be deemed sufficient evidence to authorize conviction * * *."

The Ninth Circuit perceived this in the leading case of *Russell* v. *United States*, 306 F.2d 402 (9th Cir. 1962). Since "Russell could make no report under Section 5841 without admitting an actual or presumptive violation of

law," *id.* at 409, it held that prosecution for failure to register under §5841 was unconstitutional. Every other court that has considered the same problem upon its merits has reached the same result. *Dugan* v. *United States,* 341 F.2d 85 (7th Cir. 1965); *McCann* v. *United States,* 217 F.Supp. 751 (D. Colo. 1963); *United States* v. *Fleish,* 227 F.Supp. 967 (E.D. Mich. 1964). In the court below in the present case the United States took the view that the *Russell* case had "quite properly" reached this result. Brief for United States, p. 3. The reasoning of the *Russell* case has been persuasive also to other courts dealing with similar problems. *Lovelace* v. *United States,* 357 F.2d 306, 307-309 (5th Cir. 1966); *Communist Party of the United States* v. *United States,* 331 F.2d 807, 813 (D.C. Cir. 1964).

The rationale of *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), that the privilege against self-incrimination has no relation to future acts, is not applicable to the registration requirements of §5841. Clearly, the disclosure compelled by §5841 relates only to past acts or omissions. "Every registration in compliance with Section 5841 inevitably incriminates the registrant. Each registration inevitably declares, not an intention to act, but current criminal activity". *United States* v. *Fleish,* 227 F.Supp. 967, 972 (E.D. Mich. 1964). Likewise, *United States* v. *Sullivan,* 274 U.S. 259 (1927), is not controlling. In *Sullivan,* this Court upheld a conviction for failure to file an income tax return on the theory that "if the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." *Id.* at 263. But Form 1, the form provided by the gov-

ernment for registration under §5841, cannot be used in any way without incriminating the person who files it. The form is reproduced in Appendix B at p. 29. The act of registering under §5841 is necessarily incriminating whether or not any information other than the registrant's name is supplied.[3] Furthermore, in *Sullivan,* the questions in the income tax return were directed to the public at large, while here, as in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965), "they are directed at a highly selective group inherently suspect of criminal activities" and "in an area permeated with criminal statutes." *Id.* at 79. In addition, while the requirement of filing an income tax return may be predicated upon a valid governmental interest in collecting the tax other than the compulsion of some incriminating information, "Section 5841 differs from the provisions requiring the filing of income tax returns in that the only major effect of Section 5841 is to produce incriminating information," *United States* v. *Fleish,* 227 F.Supp. 967, 970 (E.D. Mich. 1964). It does not suffice to say that an individual who has chosen to come into possession of a firearm the registration of which is required by §5841 has done so voluntarily and has thereby relinquished his privilege against self-incrimination. Such an argument may have application to a threshold admission relating to prospective activity, *Lewis* v. *United States,* 348 U.S. 419, 422-423 (1954), but not to a present or past status, *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965). Carried to its logical conclusion, the "voluntariness" argument would

[3] *Fleish* v. *Johnson,* 145 F.2d 16, 17 (9th Cir. 1944), indicates that nothing less than literal and full compliance with the requirements of §5841 [then §3261(b)] is permitted. See *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 75 (1965).

make serious inroads upon the privilege against self-incrimination. Although a person may have a free choice in the commission of a crime, the "voluntary" nature of such a choice has never been thought to defeat that person's privilege against being compelled to testify as to the crime.

If it is unconstitutional to prosecute the possessor of a firearm under §5841 for failing to register it, it would seem equally unconstitutional to prosecute a person for possession of a firearm that has not been registered under §5841. However, a strange distinction has been developed by the lower courts. Such a prosecution, first authorized by a 1958 amendment of §5851, has usually been held permissible. This distinction was first developed by the Ninth Circuit,[4] affirming a §5851 conviction and distinguishing *Russell* in three sentences. *Frye* v. *United States,* 315 F.2d 491, 494 (9th Cir. 1963). This distinction was expanded to a full paragraph by the same judge two weeks later in *Starks* v. *United States,* 316 F.2d 45, 46 (9th Cir. 1963), where the court said:

> the defendant was not charged with failing to register the weapon, as was the defendant Russell, but was charged with possession of an unregistered weapon. Section 5841, considered in Russell, makes it an offense to fail to register, and we held in Russell that to that extent, it is invalid. It is the possession of a gun that

[4] The distinction was anticipated by a district court within the Ninth Circuit, but on grounds different from those later adopted by the court of appeals, in *Hazelwood* v. *United States,* 208 F.Supp. 622 (N.D.Cal.1962). See note 6 below. Prior to development of the distinction by the Ninth Circuit, however, another district court arrested judgment on §5851 counts, on motion of the government, in *United States* v. *Mares,* 208 F.Supp. 550 (D.Colo.1962).

> no one has registered, not the failure by appellant to register, that is the essence of the offense with which appellant was charged in this case. Appellant did not have to accept or acquire possession of the gun, and when he did so, that gun not having been registered by any one, the offense was complete.

This distinction has been accepted by the Sixth, Eighth, and Tenth Circuits, and by two district courts, as well as by the Fifth Circuit in the instant case. *Pruitt* v. *United States,* 364 F.2d 826 (6th Cir. 1966); *Sipes* v. *United States,* 321 F.2d 174 (8th Cir. 1963) (dictum); *Taylor* v. *United States,* 333 F.2d 721 (10th Cir. 1964); *Castellano* v. *United States,* 350 F.2d 852 (10th Cir. 1965); *United States* v. *DePugh,* 266 F.Supp. 417, 422-423 (W.D. Mo.1967); *Capooth* v. *United States,* 238 F.Supp. 583 (S.D. Tex. 1965).

There is a further refinement of the distinction, applied by the Fifth Circuit. *Lovelace* v. *United States,* 357 F.2d 306 (5th Cir. 1966), was a §5851 prosecution, but the indictment there charged the defendant with possession of a firearm "which had not been registered by the defendant." In the cases upholding convictions under §5851, as in the present case, the indictments or informations involved had alleged only that the defendants in those cases possessed a firearm "which firearm had not been registered." This pleading difference the Fifth Circuit thought crucial. Since the indictment in the *Lovelace* case required proof that the defendant himself had not registered the gun it had "applied section 5851 in an unconstitutional manner." *Id.* at 309.

The *Starks* distinction is based upon the premise that a prosecution under §5841 charges a defendant with his own

failure to register, and cannot stand since registration necessarily incriminates him, while a prosecution under the non-registration provisions of §5851 rests on "the possession of a gun that no one has registered, not the failure by appellant to register." *Starks* v. *United States*, 316 F.2d 45, 46 (9th Cir. 1963).[5] The further distinction drawn by the Fifth Circuit apparently means that "the government in order to avoid conflict with the privilege need only be careful to draw the indictment vaguely in regard to who failed to register under §5841." Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Sup.Ct.Rev. 103, 159 n. 95.

The distinction provides a way for the government to achieve indirectly that which it is forbidden to do directly by the Fifth Amendment. The distinction has been repeatedly criticized. "The possession of an unregistered firearm prohibition operates as a method of enforcing the registration requirement. If the registration requirement violates the fifth amendment, the possession prohibition should also." Comment, *Self-Incrimination and Registration Statutes: A Case Against Constitutionality*, 4 Houston L. Rev. 507, 510 (1966). See also Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 158 n. 95; Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Col. L. Rev. 681, 690 n. 70 (1965).

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[5] Such a distinction ignores the possible inseparability of §5851 from §5841. It would appear that holding §5841 unconstitutional would prove fatal to the unregistered firearm clause of §5851 since the two provisions are interdependent and incapable of separation.

On its face, the rationale of the *Starks* line of cases contemplates that an offense charged under §5841 is separate and distinct from one under §5851 since under §5851 "the offense is the possession—not the failure to register." *Castellano* v. *United States,* 350 F.2d 852, 854 (10th Cir. 1965). In actuality, §5851 is no more than a mirror image of §5841, intended merely "to simplify and clarify the law and to aid in prosecution." S. Rep. 2090, 85th Cong., 2d Sess. (1958). The identity of the two provisions was implied by the Court in *Russell* v. *United States,* 306 F.2d 402, 407 n. 11 (9th Cir. 1962), advocated by the government's brief on appeal in the same case, *id.* at 406, and indicated by the position the government took in *United States* v. *Mares,* 208 F.Supp. 550 (D. Colo. 1962), when it moved to dismiss the §5851 counts "on the ground that the *Russell* case controls." *Id.* at 551.

There are further reasons why such a distinction is invalid. First of all, it would seem that the government, at a minimum, would have to prove possession by someone other than the defendant who was under an obligation to register, Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information,* 1966 Sup. Ct. Rev. 103, 158 n. 95, since only a possessor may register under §5841.[6] Furthermore, the burden would be on the government to show that such a prior possessor could have registered without incriminating himself, or without having a privi-

[6] Prior to *Starks* a district court had upheld §5851 on the theory that "the party may register the gun prior to possessing it and thereby avoid an act which would, as in Russell, by registering after possession, violate his Fifth Amendment rights." *Hazelwood* v. *United States,* 208 F.Supp. 622, 623 (N.D.Cal.1962). But this is in the teeth of §5841 and of the registration form, reproduced p. 29 below.

lege against incrimination, as if the prior possessor were a corporation. Unless the government can prove that there was some person entitled to register, and who could have registered without violating his constitutional privilege, the prosecution must fail. *Communist Party of the United States* v. *United States,* 331 F.2d 807 (D.C. Cir. 1964); *Communist Party of the United States* v. *United States,* 35 U.S.L.Wk. 2509 (D.C. Cir. 1967); cf. *Heikkinen* v. *United States,* 355 U.S. 273 (1958). There is no indication in the cases that the government has ever made such a showing.

There is an even more serious flaw in the distinction suggested by *Starks.* Section 5851 makes it unlawful to possess "any firearm which has not been registered as required by Section 5841." Section 5841 requires registration by "every person possessing a firearm." Prior compliance with the provisions relating to transfer, importation, or making, obviates the need for registration, as the second sentence of §5841 declares, but prior registration does not. This is clear on the face of the statute, and it was so held in *Crapo* v. *United States,* 100 F.2d 996 (10th Cir. 1939). It was decided there that if a gun is in the joint possession of two persons, registration by one would not satisfy the duty of the other possessor also to register.

Although a district court in *United States* v. *DePugh,* 266 F.Supp. 417, 423 (W.D.Mo.1967), ruled, without stating any reasons, that registration by a prior possessor made it unnecessary for the present possessor to register, the contrary holding in *Crapo* seems surely right. The statutory obligation to register is imposed on "every person possessing a firearm." The relevant Treasury Regulation spells the point out beyond cavil. "Every person in

the United States possessing a firearm (a) not registered to him * * * " is required to register. Treas. Reg. §179.120. Even if a firearm has been registered by a prior possessor, the present possessor must register because it is not registered "to him."

In a prosecution under this clause of §5851 possession of a firearm not registered as required by §5841 is an essential element. *Bryan* v. *United States,* 373 F.2d 403, 406 (5th Cir. 1967); *Frye* v. *United States,* 315 F.2d 491, 494 (9th Cir. 1963). If the present possessor has not registered, then the firearm "has not been registered as required by Section 5841" and he is guilty of a violation of §5851, even though someone else has registered the firearm in the past. On this view there is no substance to the distinction developed in *Starks* and *Lovelace* and the other cases, and a defendant's privilege against self-incrimination is as much violated by an indictment or information drawn in terms of the non-registration provision of §5851 as by one drawn in terms of §5841. The distinction is logically meaningless.

In its Brief in Opposition to Certiorari, the United States offered a somewhat different, but no more substantial, distinction in support of the decision below and the cases on which it relied. The United States apparently accepted the holdings in both *Russell* and *Lovelace,* conceding that "the prosecution, no matter how styled, actually was for failing to register." Brief in Opposition, p. 4 n. 4. It argued that no affirmative declaration is required by a defendant that may implicate him in another crime, that the failure to register is not the essence of the crime, and that the critical fact is "his failure to make certain, at the time he accepts possession, that there is a legal

'chain of title' in existence." *Ibid.* To this there is a short answer. If the person taking possession of the firearm checks with the Treasury Department and finds that there is a legal chain of title in existence, including a record of its transfer to him, he is exempted from the registration requirement by the second sentence of §5841, and no prosecution will lie under the portion of §5851 here in issue. Only if the weapon has at some point been made or transferred in violation of other provisions of the act and there is no sufficient chain of title does the registration provision come into play. It does then require an affirmative declaration, sufficient to incriminate the person under the other clauses of §5851, that he possesses a firearm that has been made or transferred unlawfully. If, and only if, he refuses to convict himself out of his own mouth by registering the weapon can he be convicted under this clause of §5851.

The language of §5851 here in question was added to that section by Congress in 1958. Act of Sept. 2, 1958, Pub.L. 85-859, Tit. II, §203(h)(1), (2), 72 Stat. 1428. It cannot even be justified by the necessities of law enforcement. In every case in which a person possesses a firearm not registered as required by §5841, the firearm must, by hypothesis, have been made or transferred in violation of the making and transfer provisions, since if those other provisions have been complied with registration is not required under §5841. Thus any person who could be prosecuted under the registration clause of §5851 could be prosecuted under the making or transfer clauses of that section as they stood prior to the 1958 amendment. In *Waters* v. *United States,* 328 F.2d 739 (10th Cir. 1964), the government voluntarily dismissed an indictment under

the registration clause of §5851, apparently thinking it was unconstitutional, and immediately filed a new information based on possession of the same firearm but invoking the making clause of §5851. See also *United States* v. *Mares,* 208 F.Supp. 550 (D.Colo.1962), affirmed 319 F.2d 71 (10th Cir. 1963), where conviction on counts charging possession of unregistered firearms under §5851 was set aside on constitutional grounds, while conviction of violating §5851 with regard to the same weapons but asserting that they were made in violation of §5821 was upheld. Indeed the indictment in this very case (R. 3-4) shows how totally unnecessary the registration clause of §5851 is for law enforcement. Its only effect is to trivialize the guarantees of the Fifth Amendment.

"So long as the self-incrimination clause of the Fifth Amendment endures, activity may be made criminal, but the actor cannot be compelled to characterize it as such and to disclose it. If Congress would do the one, it may have to forego the other. The choice by Congress of the means it believes more effective remains with it." *Communist Party of the United States* v. *United States,* 35 U.S.L.Wk. 2509 (D.C.Cir.1967). If Congress wants to compel disclosure of firearms made or transferred in violation of law, then it cannot make it criminal to possess such a firearm.

The decisions holding §5841 unconstitutional are right, since that statute requires self-incrimination. The registration clause of §5851 purports to punish persons for refusing to incriminate themselves under §5841. This Congress cannot do.

Conclusion

The judgment below should be reversed with instructions to dismiss Count II of the information.

Respectfully submitted,

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APPENDIX A

Other Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V. No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

United States Code, title 26, section 5811:

(a) *Rate.* There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200 for each firearm: *Provided,* That the transfer tax on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848(5), shall be at the rate of $5. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

(b) *By whom paid.* Such tax shall be paid by the transferor: *Provided,* That if a firearm is transferred without payment of such tax the transferor and transferee shall become jointly and severally liable for such tax.

(c) *How paid.* Payment of the tax herein provided shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

United States Code, title 26, section 5812:

(a) *Transfers exempt.* This chapter shall not apply to the transfer of firearms—

(1) to the United States Government, any State, Territory, or possession of the United States, or to any political subdivision thereof, or to the District of Columbia;

(2) to any peace officer or any Federal officer designated by regulations of the Secretary or his delegate;

(3) to the transfer of any firearm which is unserviceable and which is transferred as a curiosity or ornament.

(b) *Notice of exemption.* If the transfer of a firearm is exempted as provided in subsection (a), the person transferring such firearm shall notify the Secretary or his delegate of the name and address of the applicant, the number or other mark identifying such firearm, and the date of its transfer, and shall file with the Secretary or his delegate, such documents in proof thereof as the Secretary or his delegate may by regulations prescribe.

United States Code, title 26, section 5813:

(a) *Affixing.* The stamps provided for in section 5811 (c)(1) shall be affixed to the order for such firearm, provided for in section 5814.

United States Code, title 26, section 5814:

(a) *General requirements.* It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Secretary or his delegate. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this chapter: *Provided,* That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) *Contents of order form.* Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Secretary or his delegate. The original thereof, with stamp affixed, shall be returned to the applicant.

(c) *Exemption in case of registered importers, manufacturers, and dealers.* Importers, manufacturers, and dealers who have registered and paid the tax as provided for in this chapter shall not be required to conform to the provisions of this section with respect to transactions in firearms with dealers or manufacturers if such dealers or manufacturers have registered and have paid such tax, but shall keep such records and make such reports regarding such transactions as may be prescribed by regulations under this chapter.

(d) *Supply.* The Secretary or his delegate shall cause suitable forms to be prepared for the purposes of subsection (a), and shall cause the same to be distributed to officers designated by him.

United States Code, title 26, section 5821:

(a) *Rate.* There shall be levied, collected, and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of $200 for each firearm so made.

(b) *Exceptions.* The tax imposed by subsection (a) shall not apply to the making of a firearm—

(1) by any person who is engaged with the United States in the business of manufacturing firearms;

(2) from another firearm with respect to which a tax has been paid, prior to such making, under subsection (a) of this section; or

(3) for the use of—

(A) the United States Government, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or

(B) any peace officer or any Federal officer designated by regulations of the Secretary or his delegate.

Any person who makes a firearm in respect of which the tax imposed by subsection (a) does not apply by reason of the preceding sentence shall make such report in respect thereof as the Secretary or his delegate may by regulations prescribe.

(c) *By whom paid; when paid.* The tax imposed by subsection (a) shall be paid by the person making the firearm. Such tax shall be paid in advance of the making of the firearm.

(d) *How paid.* Payment of the tax imposed by subsection (a) shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

(e) *Declaration.* It shall be unlawful for any person subject to the tax imposed by subsection (a) to make a firearm unless, prior to such making, he has declared in writing his intention to make a firearm, has affixed the stamp described in subsection (d) to the original of such declaration, and has filed such original and a copy thereof. The declaration required by the preceding sentence shall be filed at such place, and shall be in such form and contain such information, as the Secretary or his delegate may by regulations prescribe. The original of the declaration, with the stamp affixed, shall be returned to the person making the declaration. If the person making the declaration is an individual, there shall be included as part of the declaration the fingerprints and a photograph of such individual.

United States Code, title 26, section 5841:

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer

thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

United States Code, title 26, section 5844:

Under such regulations as the Secretary or his delegate may prescribe, and upon proof of the exportation of any firearm to any foreign country (whether exported as part of another article or not) with respect to which the transfer tax under section 5811 has been paid by the manufacturer, the Secretary or his delegate shall refund to the manufacturer the amount of the tax so paid, or, if the manufacturer waives all claim for the amount to be refunded, the refund shall be made to the exporter.

United States Code, title 26, section 5845:

No firearm shall be imported or brought into the United States or any territory under its control or jurisdiction, except that, under regulations prescribed by the Secretary or his delegate, any firearm may be so imported or brought in when—

(1) the purpose thereof is shown to be lawful and

(2) such firearm is unique or of a type which cannot be obtained within the United States or such territory.

United States Code, title 26, section 5846:

All provisions of law (including those relating to special taxes, to the assessment, collection, remission, and refund of internal revenue taxes, to the engraving, issuance, sale, accountability, cancellation, and distribution of taxpaid stamps provided for in the internal revenue laws, and to penalties) applicable with respect to the taxes imposed by

sections 4701 and 4721, and all other provisions of the internal revenue laws shall, insofar as not inconsistent with the provisions of this chapter, be applicable with respect to the taxes imposed by sections 5811(a), 5821(a) and 5801.

United States Code, title 26, section 5848:

For purposes of this chapter—

(1) *Firearm.* The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

(2) *Machine gun.* The term "machine gun" means any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger.

(3) *Rifle.* The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

(4) *Shotgun.* The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a num-

ber of ball shot or a single projectile for each single pull of the trigger.

(5) *Any other weapon.* The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, but such term shall not include pistols or revolvers or weapons designed, made or intended to be fired from the shoulder and not capable of being fired with fixed ammunition.

(6) *Importer.* The term "importer" means any person who imports or brings firearms into the United States for sale.

(7) *Manufacturer.* The term "manufacturer" means any person who is engaged within the United States in the business of manufacturing firearms, or who otherwise produces therein any firearm for sale or disposition.

(8) *Dealer.* The term "dealer" means any person not a manufacturer or importer, engaged within the United States in the business of selling firearms. The term "dealer" shall include wholesalers, pawnbrokers, and dealers in used firearms.

(9) *Interstate commerce.* The term "interstate commerce" means transportation from any State or Territory or District, or any insular possession of the United States, to any other State or to the District of Columbia.

(10) *To transfer or transferred.* The term "to transfer" or "transferred" shall include to sell, assign, pledge, lease, loan, give away, or otherwise dispose of.

(11) *Person.* The term "person" includes a partnership, company, association, or corporation, as well as a natural person.

United States Code, title 26, section 5851:

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in

violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

United States Code, title 26, section 5861:

Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined not more than $2,000, or be imprisoned for not more than 5 years, or both, in the discretion of the court.

Treasury Regulations, section 179.120: Every person in the United States possessing a firearm (a) not registered to him, or (b) acquired by transfer, importation or making without conforming with the provisions of Chapter 53 of the Internal Revenue Code of 1954, if such provisions were applicable at the time of such transfer, importation, or making, must execute an application for the registration of such firearm on Form 1 (Firearms), in duplicate, with the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D.C. If registration is accepted, the duplicate form, after proper endorsement, will be returned to the registrant by the Director, Alcohol and Tobacco Tax Division. The filing of Form 1A (Firearms) in respect to the making of a firearm, Form 2 (Firearms) in respect of newly manufactured firearms and Form 6 (Firearms) in respect of imported firearms shall be accepted, in lieu of Form 1 (Firearms), as registration of the firearms described in such forms. Where the transfer of a registered firearm is reported on Forms 2, 3, 4, and 5 (Firearms) it will not be necessary for the transferee to apply for registration of the firearm on Form 1 (Firearms).

APPENDIX B

FORM 1 (FIREARMS)
(REV. NOV. 1966)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

APPLICATION FOR REGISTRATION OF FIREARM

(Chapter 53, Internal Revenue Code)

(Submit in duplicate for each firearm possessed. See instructions on reverse)

TO: Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C. 20224

The undersigned hereby applies for registration of the firearm described below, as required by section 5841 of the Internal Revenue Code.

1. DATE

2. NAME AND RETURN ADDRESS OF REGISTRANT *(Number and Street, City, State, ZIP Code)*

3. PLACE OF BUSINESS OR EMPLOYMENT

4. DATE FIREARM ACQUIRED

5. PLACE WHERE FIREARM IS USUALLY KEPT

6. DATE OF BIRTH IF AN INDIVIDUAL *(Month, day, year)*

7. SOCIAL SECURITY NUMBER *(If an individual)*

8. EMPLOYER IDENTIFICATION NUMBER *(If partnership, company, or corporation)*

9. HAVE YOU EVER BEEN CONVICTED OF A FELONY?

☐ YES ☐ NO *(If "Yes," explain in a separate statement indicating disposition of case and attach same to this application)*

10. KIND OF FIREARM *(Machine gun, short barrel shotgun, etc. See instruction 5(B) on reverse)*

11. SERIAL NUMBER

12. LENGTH OF BARREL *(Inches)*

13. OVERALL LENGTH *(If a weapon made from a shotgun or a rifle or if in "Any Other Weapon" category)*

14. CALIBER OR GAUGE

15. MODEL

16. NAME AND ADDRESS OF MANUFACTURER OF FIREARM

17. OTHER MARKS OF IDENTIFICATION

18. IF FIREARM IS UNSERVICEABLE EXPLAIN HOW IT WAS MADE UNSERVICEABLE

I declare under the penalties of perjury that this application for registration has been examined by me and to the best of my knowledge and belief is a true, correct, and complete application for registration.

19. SIGNATURE

20. TITLE OR STATUS *(State whether individual owner, member of firm, or if officer of corporation, give title. If registrant is other than a natural person, give name and home address of an executive officer thereof)*

FOR USE OF INTERNAL REVENUE SERVICE - APPLICANT WILL MAKE NO ENTRY IN THIS PART

21. ☐ ACCEPTED FOR REGISTRATION. THIS FORM WHEN SO CHECKED AND SIGNED BELOW CONSTITUTES EVIDENCE OF REGISTRATION UNDER THE NATIONAL FIREARMS ACT. SUCH REGISTRATION DOES NOT PERMIT THE REGISTRANT TO POSSESS THE FIREARM IN VIOLATION OF STATE OR LOCAL LAW.

22. DATE

23. SIGNATURE, DIRECTOR, ALCOHOL AND TOBACCO TAX DIVISION

See reverse

INSTRUCTIONS

1. Preparation of application for registration of a firearm.--It is preferred that this form be prepared by use of a typewriter, using carbon paper to make an exact duplicate. Pen and ink may be used, but under no circumstances may a lead pencil be used. The form is to be prepared in duplicate and submitted to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C. 20224.

2. Persons required to register firearms.--Every person possessing a firearm shall register on this form, in duplicate, with the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C. 20224, the number and other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment; and, if such person is other than a natural person, the name and home address of an executive officer thereof. In case the firearm is merely in the custody of an employee, such as a watchman, the actual owner should execute this form. No person shall be required to register a firearm which he has previously registered or he has acquired by transfer or importation or has made, if the provisions of chapter 53 of the Internal Revenue Code applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with. (Sec. 5841, I.R.C.)

3. Disposition of application for registration of a firearm.--The duplicate form, after the registration has been accepted, will be returned to the registrant by the Director, Alcohol & Tobacco Tax Division, and the original will be retained in the National Firearms Registration & Transfer Record, Alcohol and Tobacco Tax Division, Washington, D. C.

4. Stolen or lost firearms or documents.--Immediately upon the discovery that the firearm or registration form has been stolen, lost, or destroyed, the person losing possession will immediately upon discovery of the theft, loss, or destruction, report the matter to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C. 20224. The report will show in detail the circumstances of the theft, loss, or destruction and will include all known facts which may serve to identify the firearm or document.

5. Definitions.--

(A) Felony--Any offense punishable by death or imprisonment for a term exceeding one year.

(B) Firearm--The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition. (Sec. 5848, I.R.C.)

6. Scope of firearms registration provisions.--The provisions of section 5841 of the Internal Revenue Code, relating to registration of firearms, are applicable to persons residing within the United States (i.e., the several States and the District of Columbia).

7. PENALTIES.--Any person who violates or fails to comply with any of the requirements of chapter 53 of the Internal Revenue Code shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than 5 years, or both, in the discretion of the court. Moreover, any firearm involved in any violation of the provisions of chapter 53 of the Internal Revenue Code or any regulations promulgated thereunder shall be subject to seizure and forfeiture.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 236

MILES EDWARD HAYNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of appeals (R. 11–15) is reported at 372 F. 2d 651.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1967 (R. 16). The petition for a writ of certiorari was filed on March 11, 1967, and was granted on June 12, 1967 (R. 17). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of 26 U.S.C. 5851 making it a crime to possess a firearm that "has not been reg-

istered as required by Section 5841" is, on the face of it, an unconstitutional invasion of the Fifth Amendment privilege. This question involves the following subsidiary questions of statutory construction:

(a) Whether a charge of violating Section 5851 necessarily charges the defendant with a failure to register under Section 5841; and

(b) Whether registration under Section 5841 necessarily incriminates the registrant of a violation of some other provision of the National Firearms Act.

2. Assuming an affirmative answer to question 1, whether the proper remedy is to bar the use of information obtained through a registration under Section 5841, in a criminal prosecution of the registrant, rather than to sanction a failure to register?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's brief (pp. 2–3) adequately sets forth the constitutional and statutory provisions here involved. Since other provisions of the National Firearms Act, and the regulations thereunder, are referred to throughout this brief, we are lodging with the Court copies of Treasury Department Publications No. 364 and 232. The former contains the full text of the National Firearms Act.[1] The latter sets out the full text of the regulations.[2]

[1] Document No. 364 also contains the text of the Federal Firearms Act, see footnote 7, *infra*, which is not in issue here.

[2] Copies of the two publications are also being provided to counsel for petitioner.

STATEMENT

The second count of a three-count information,[3] which was filed on March 4, 1966, in the United States District Court for the Northern District of Texas, charged that (R. 3–4):

> On or about February 8, 1965, in Dallas, Dallas County, Texas, and in the Dallas Division of the Northern District of Texas, MILES EDWARD HAYNES, defendant herein, knowingly and unlawfully possessed a firearm as defined by Section 5848(1), Title 26, United States Code, to wit, a weapon made from a 410 gauge single shot shotgun with a barrel length of 12 5/16 inches, stock cut off, overall length 20-3/8 inches, Serial No. 759885, which firearm had not been registered with the Secretary of the Treasury or his delegate, that is, the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D.C., as required by Section 5841, Title 26, United States Code, and Section 179.98 of Title 26 Code of Federal Regulations, Part 179.

On March 10, 1966, petitioner moved to dismiss this count on the ground (R. 5)[4] that "Section 5851 of Title 28, United States Code, which charges an offense with respect to Section 5841 is unconstitutional and therefore cannot support Count II of the information." This motion was denied on March 25 (R. 6–7).

[3] Petitioner waived indictment (R. 1).

[4] A further ground, "(t)hat Defendant, in lieu of the above, has been denied due process under the Fifth Amendment and his right to a fair trial" is not here urged.

On March 28, petitioner pleaded guilty to Count 2 [5] and on April 7, 1966, he was sentenced to four years' imprisonment (R. 2, 8–9). The judgment was affirmed on appeal against a challenge that reasserted petitioner's claim of unconstitutionality of the statute (R. 11–15, 372 F. 2d 651).

SUMMARY OF ARGUMENT

The National Firearms Act imposes annual occupational excise taxes of $500, $300, $200, $25 or $10 on those whose business is the importation, manufacture, or sale of certain firearms, including the modified shotgun that petitioner had. With specified exceptions, the Act also imposes a $200 excise tax on the making of such weapons by anyone who is not a manufacturer, and a tax of $200 on transfers of some such weapons, and of $5 on transfers of others.

In support of this system of taxation Congress has provided an information-gathering system designed to give the Treasury notice of the existence and location of every weapon that is encompassed within the Act's definition of firearm, so that the tax collector is aware of every item that has or may become subject to tax. The general requirement is that the maker or transferor give advance written notice of the proposed making or transfer of a firearm. There are some exceptions, *e.g.*, when the maker or both the transferor and transferee are subject to the occupational tax. In these latter circumstances record-keeping and reporting requirements apply. There are,

[5] Counts 1 and 3 were dismissed by the government at the time of petitioner's plea of guilty to Count 2 (R. 2).

however, situations where the Treasury either will not gain knowledge of the existence or location of a firearm through the prior notice or records required of makers and transferors, or will learn of it only after a transfer. Section 5841 of the Act is intended to fill this gap and provide the government with the requisite data when other requirements have not. Thus, Section 5841 requires anyone having a firearm in such circumstances to register. The portion of Section 5851 under which petitioner was convicted makes unlawful the possession of a firearm which should have been, but has not been, registered under Section 5841.

Petitioner's argument that registration under Section 5841 necessarily incriminates the registrant of a violation of some other provision of the Act overlooks two ways in which a firearm can be acquired where the possessor must register, but cannot thereby incriminate himself: in a transaction between persons subject to the occupational tax; and in circumstances that do not result in a "transfer" within the meaning of the statute.

There will also be circumstances where the maker or transferor should have filed, but did not make, a report of the transaction to the government. In such a situation registration under Section 5841 theoretically could be "a link in the chain of evidence" in a criminal prosecution of the registrant. An example would be where a person other than a manufacturer has made a firearm from a gun the making of which was not previously taxed, and fails, as Section 5821 requires, to file in advance a declaration of his inten-

tion to make such a firearm with the stamp tax affixed. His making of a gun in such circumstances is criminal, and his continued possession of the firearm after making it is a separate crime, unless he registered under Section 5841. Although his registration would in no way prove that he was the maker, it could give the government a lead to proof of his making. We submit that even in such a case, registration under Section 5841 would incriminate the registrant to no greater degree than a tax return that reports income from an undisclosed and presumptively unlawful source. This Court has previously held, in *United States* v. *Sullivan,* 274 U.S. 259, that the requirement of filing a return in such a situation is constitutionally permissible. Although *Sullivan* can be distinguished from the present case, we believe there are sufficient similarities to justify applying its rationale here.

But even should this Court decide that Section 5841 compels the self incrimination of the registrant, there is nothing in the language of the charge against petitioner or the surrounding circumstances that permit the conclusion that his punishment under Section 5851 was for his own failure to register. His prosecution rested on the fact that he had a weapon that had never been registered, so the tax collector had no notice of its existence, before petitioner acquired it.

Each of the five courts of appeals that has reviewed a case comparable to this one has held that there is no infringement of the constitutional protection against self-incrimination. Any other result would mean that persons in petitioner's position can escape

prosecution in reliance upon the claimed constitutional rights of other unknown persons who are not in court and whose claimed liability to prosecution is wholly speculative.

If all of the foregoing arguments are rejected, we ask the Court, as we do in *Marchetti* v. *United States,* No. 2, this Term, and *Grosso* v. *United States,* No. 12, this Term, to rule that the proper remedy is to bar the use of information obtained from the registration in a criminal prosecution of the registrant, rather than sanction a failure to register. In this way the Court can satisfy both the registrant's asserted need for protection against self-incrimination, and the tax collector's need for the information the registration provides.

ARGUMENT

I. EXAMINATION OF THE STATUTORY SCHEME SHOWS THAT THE CHALLENGED REGISTRATION REQUIREMENT HAS A VALID TAX PURPOSE, DOES NOT REQUIRE AN ADMISSION OF CRIMINALITY, AND COMES WITHIN THE RATIONALE OF *UNITED STATES* V. *SULLIVAN*

Petitioner's contention that he has been punished for a refusal to incriminate himself rests on two propositions that reflect his construction of the statutory provisions and are necessary to his claim that the clause of Section 5851, 26 U.S.C. 5851, that makes it a crime to possess a firearm that "has not been" registered as required by Section 5841, 26 U.S.C. 5841, is invalid on its face. He first asserts that Section 5841 requires registration only in circumstances where the registrant has acquired his firearm in vio-

lation of some other provision of the National Firearms Act and that therefore the act of registration necessarily incriminates the registrant. The second essential step in petitioner's reasoning is the argument that a prosecution under the clause of Section 5851 invoked here necessarily is based on the failure of the defendant to register, rather than on an allegation that no person registered the weapon before the defendant acquired it.

We concede that if petitioner's reading of the two provisions were right, registration under Section 5841 would be incriminatory and, except for the position we advance in the last portion of this brief, petitioner's conviction under Section 5851 would not be valid. But our contention is that petitioner construes neither section correctly. We accordingly turn in this section of our brief to an examination of Section 5841 against the background of the statutory context in which it appears. If we are correct that the purpose and effect of Section 5841 is to require registration where a person who has violated no law obtains possession of a firearm without the knowledge of the tax collector, then the foundation for petitioner's legal position disappears.

A. THE NATIONAL FIREARMS ACT IMPOSES OCCUPATIONAL EXCISE TAXES ON THOSE WHOSE BUSINESS IS FIREARMS, AND, WITH SOME EXCEPTIONS, A TRANSACTIONAL EXCISE TAX ON THE MAKING OF FIREARMS BY THOSE NOT SUBJECT TO THE OCCUPATIONAL TAX AND ON THE TRANSFER OF FIREARMS

The National Firearms Act, 26 U.S.C. 5801–5861, was the outgrowth of a number of bills intended to regulate firearms that were introduced in Congress

following the attempted assassination of then President-Elect Roosevelt in February 1933. See Bakal, *The Right to Bear Arms* (1966) 167–174. The substance of the statute enacted on June 26, 1934 (see 48 Stat. 1236) has been carried forward to the present law, see 1954 United States Code Cong. & Adm. News 4539–4553, 5206–5210, with the sole exception of the 1958 addition to Section 5851 of the clause under which petitioner was prosecuted.

The Act deals with five general categories of weapons and accessories. Thus 26 U.S.C. 5848 defines "firearm" to include (1) shotguns having barrels less than 18 inches long, and rifles having barrels less than 16 inches long; (2) other guns made from a rifle or a shotgun and having an overall length of less than 26 inches; (3) any other weapon, except a pistol or revolver, that can be concealed on the person; (4) machine guns and other automatics; and (5) mufflers and silencers.[6]

A later Congress commented that these particular items were singled out for special excise tax treatment "to make it more difficult for the gangster element to obtain certain types of weapons." S. Rep. No. 1303, 86th Cong., 2d Sess., p. 2 (1960).[7] This Court, while recognizing the "deterrent effect" of the taxes imposed on these weapons, upheld the statute in *Son-*

[6] 26 U.S.C. 5848(2)–5848(5) define "machine gun", "rifle", "shotgun", and "any other weapon".

[7] Other firearms, thought more likely to be used by sportsmen, have been regulated through restrictions placed on their shipment in interstate and foreign commerce. See Federal Firearms Act, 15 U.S.C. 901–909.

zinsky v. *United States*, 300 U.S. 506, stating (p. 513) that "a tax is not any less a tax because it has a regulatory effect * * * an exercise of the taxing power is not any less so because a tax is burdensome or tends to restrict or suppress the thing taxed."[8] See, also, *United States* v. *Miller*, 307 U.S. 174.

The statute imposes three types of excise tax. These are an occupational tax, a making tax, and a transfer tax.

An annual occupational excise tax of $500, $300, $200, $25, or $10 must be paid by those in the business of importing, manufacturing, or dealing in firearms. 26 U.S.C. 5801. The highest tax of $500 is paid by all importers, and by manufacturers who produce any firearm other than certain combination shotgun-rifles and "other weapons" described respectively in Sections 5801(a) and 5848(5). Pawnbrokers pay $300.[8a] Other dealers pay $200 unless their business is restricted to such shotgun-rifles and other weapons. Such other dealers and manufacturers whose business is so restricted pay annual taxes of $10 and $25 respectively.

Section 5821(a) imposes an excise tax on the "making" of a firearm by a person who fails to satisfy two conditions. The tax does not apply if the maker is subject to the manufacturer's occupational tax, see 26 U.S.C. 5821(b)(1) and 5848(7), or if the weapon

[8] Petitioner expressly disclaims any challenge to the use of the taxing power for the "worthy goal" of regulating the type of weapon here in question (Br. 5).

[8a] 26 U.S.C. (1964 ed.) 5801(a)(3) erroneously states the tax for pawnbrokers to be $200. See 74 Stat. 149.

is made "from another firearm with respect to which a tax has been paid" previously under Section 5821(a), see 26 U.S.C. 5821(b)(2).

Section 5811(a) imposes a $200 excise tax on the transfer in the United States of any firearm other than the weapons that are the subject of the lesser occupational taxes. Transfers of these latter guns are subject to a $5 excise.

An exception from tax is granted whenever a firearm is made for the use of, or transferred to, a domestic governmental body, or "any peace officer or any Federal officer designated by regulations of the Secretary or his delegate." 26 U.S.C. 5812(a)(1)-(2), 5821(b)(3).[9] Nor is tax imposed on an "unserviceable" weapon "which is transferred as a curiosity or ornament", 26 U.S.C. 5812(a)(3), or on transfers between persons subject to the occupational tax, 26 U.S.C. 5814(c); see Treas. Regs. § 179.103, 26 C.F.R. In addition, the transfer tax will be refunded if paid by a manufacturer, and the transferee exports the weapon. 26 U.S.C. 5844.[10] These exemptions are similar to the pattern found generally in federal excise tax statutes, which, for example, exempt from the Manufacturer's Excise Tax on such items as automobiles and refrigerators sales for further manufac-

[9] Such "peace officers" are defined in Treas. Regs. § 179.104, 26 C.F.R.

[10] The National Firearms Act imposes no tax on importation. However, Section 5845 bans importation except of a firearm that "is unique or of a type which cannot be obtained" domestically, and where "the purpose thereof is shown to be lawful * * *."

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ture or export, or to state governmental bodies, or nonprofit educational organizations, see 26 U.S.C. 4221(a).[11]

B. COMPREHENSIVE RECORD KEEPING AND REPORTING REQUIREMENTS, OF WHICH SECTION 5841 IS ONE, ARE DESIGNED TO GIVE THE TREASURY NOTICE OF THE EXISTENCE AND LOCATION OF EVERY PERSON AND FIREARM THAT IS OR MAY BE TAXABLE

The National Firearms Act, like every federal tax measure, contains extensive reporting requirements designed to facilitate the collection of tax by giving the collector notice of each person, chattel, and transaction that is or may become taxable. The registration requirements of Section 5841 must therefore be measured against the background of the entire information-gathering scheme of an Act of which the section is but one integral part.

The occupational taxes are enforced through the registration requirements of Section 5802; annually, each person subject to the tax must register, and pay the tax, in each district in which he has a principal or other place of business. Every manufacturer and importer is also required to place on every firearm "a number and other identifying marks * * *." 26 U.S.C. 5843. Section 5842 gives the Treasury broad discretion to require such persons to "keep * * * books and records and render * * * returns in relation to the transactions in firearms specified in this chapter * * *." This latter provision has been implemented by a requirement that such persons keep records, accessible for inspection, that show:

[11] See also 26 U.S.C. 4253(c), 4263 (b), (c).

"the manufacture, receipt, transfer or other disposition of all firearms"; the date of any such occurrence; identifying characteristics of each firearm; and the name and address of each transferee. This same information is to be reported by return "[i]mmediately upon the manufacture, receipt, transfer or, other disposition of any firearm * * *." Treas. Regs. §§ 179.150, 179.151, 26 C.F.R.

Section 5821(e) deals with persons subject to the tax on making imposed by Section 5821(a). It forbids any such person to make a firearm without first filing with the government a written declaration of his intention, with the appropriate tax stamp affixed. The Treasury has authority to require persons not subject to Section 5821(a) to make such report of their making of a firearm as is considered necessary. 26 U.S.C. 5821(b). In exercise of this authority, the Treasury has required such manufacturers to keep the records and make the returns described in Sections 179.150 and 179.151 of the Regulations, *supra*. See Treas. Regs. § 179.82, 26 C.F.R.

Reporting requirements relating to the transfer of firearms are found in Sections 5814 and 5812(b). A taxable transfer may not be made unless the transferor obtains a written order from the transferee, 26 U.S.C. 5814(a), adds to it information identifying the firearm, 26 U.S.C. 5814(b), affixes the stamp tax, 26 U.S.C. 5813, and forwards a copy of the order to the Treasury, 26 U.S.C. 5814(b). Where the transfer is not taxable because it is between persons subject to the occupational tax, the Treasury has authority to

require informational records and reports; no special provision is made apart from those in Sections 179.150 and 179.151 of the Regulations, *supra*. Where the exemption is based on a transfer to a government or a peace officer, or the unserviceable nature of the weapon, Congress requires that the transferor "shall notify" the Treasury of the name and address of the transferee, the date of transfer, and the identifying characteristics of the firearm. 26 U.S.C. 5812(b); Treas. Reg. § 179.105, 26 C.F.R.

The foregoing reporting and record-keeping provisions, if complied with, are adequate to give the Treasury advance notice of the existence and location of every firearm the making or transfer of which will occur in circumstances requiring payment of a tax. They are in addition adequate to provide after-the-fact information of the nontaxable making of any firearm and most exempt transfers, occurring after the effective date of the Act.

However, none of the provisions described above would have given the Treasury data with respect to weapons in existence when the National Firearms Act was adopted. Nor do they cover every circumstance where a firearm may change hands, or where one has been imported in unwitting violation of the Act.[12] Moreover, in exempt transactions, as between manufacturers and dealers, the transferor is not re-

[12] Although importation is as a general matter forbidden, see footnote 10, *supra*, importation is a crime only if it occurs "fraudulently or knowingly * * * in violation of" the Act. 26 U.S.C. 5853(1).

quired to give advance notice of the transaction, so that the transferee may acquire possession before any notice is given the Treasury. And there inevitably will be circumstances where, through a transferor's failure to comply with Section 5814(b), the government does not receive notice of the transferee's possession. The language and history of Section 5841 show that it and its predecessors were intended to fill these gaps in the information that the other provisions of the Act provide to the tax collector.

The first antecedent of the present provisions was Section 5(a) of the Act originally adopted on June 26, 1934. It had a registration feature designed to provide a register of the total number and types of firearms in the country as of September 24, 1934, which would be subject to tax if and when transferred. Thus Section 5(a) required that, within 60 days after the effective date of the new statute (July 26, 1934), every person possessing a firearm should register the weapon with the Internal Revenue Service. There was a proviso, however, that "no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act." 48 Stat. 1238. The obvious purpose of the proviso was to avoid registrations that would merely duplicate information already given the Treasury.

The question then arose whether the registration requirement ended with the 60-day period between July 26 and September 24, 1934. The Act was therefore amended in 1939 through the addition of Section

3261(b) of the Internal Revenue Code of 1939, 26 U.S.C. 3261(b) (1946 ed.). That section was intended to make clear that the requirement of registration was a continuing one "with respect to any firearm acquired after July 26, 1934 * * *." The requirement was carried forward in the 1954 recodification of the Code, *i.e.*, in the present Section 5841,[13] which is the focus of petitioner's contention.

C. REGISTRATION UNDER SECTION 5841 GENERALLY CAUSES NO INCRIMINATION AND IN NO CIRCUMSTANCE RESULTS IN MORE SPECIFIC IDENTIFICATION OF CRIMINAL CONDUCT THAN THE FILING REQUIREMENT APPROVED IN *UNITED STATES* V. *SULLIVAN*

The precise language of Section 5841 is as follows:

> Registration of persons in general: Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer * * * importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

Its language is clear enough. The first sentence, in the most general of terms, requires "every person

[13] The present language is essentially that which was developed in a 1952 amendment to Section 3261(b) of the 1939 Code, 66 Stat. 88.

possessing a firearm [to] register * * *." The second sentence provides an exception for those who possess a firearm as the result of an acquisition that was subject to the Act, provided the applicable provisions were complied with.

Any confusion as to the purport of Section 5841 thus results not from the language of that section. Rather, any misconception of its purpose—and any holding that the Fifth Amendment forbids such a registration requirement—results from a failure to recognize two salient features of the exception to registration that the second sentence grants: *First,* it is possible to acquire a firearm other than by a "making" or "transfer" as those terms are used in the statute; and *second,* in a transfer between persons subject to the occupational tax, the advance notice provisions of Section 5814 do not apply.

Petitioner's case is built on his assertion that "It is difficult to conceive of one possessing a firearm that he has not either made or acquired by transfer, especially in light of the expansive definition given to 'transfer' for purposes of the act. 26 U.S.C. § 5848 (10)." (Br. 7.) But that "expansive" definition fails to cover a variety of circumstances. The language of section 5848(10) is:

> "The term 'to transfer' or 'transferred' shall include to sell, assign, pledge, lease, loan, give away, or otherwise dispose of."

For example, no provision is made for the person who finds and keeps a lost or abandoned weapon. Nor does

the statute define as a transfer the placement of a firearm in the hands of the owner's agent or bailee; but surely the agent or bailee secures possession.

Experience during the 33 years of administration of the National Firearms Act has demonstrated that these are real and not merely theoretical possibilities. Indeed, any difficulties of conception should have been laid to rest by the circumstances of *United States* v. *Forgett*, 349 F. 2d 601 (C.A. 6), certiorari denied, 383 U.S. 926, a case of which petitioner takes no note. There the Sixth Circuit affirmed a conviction of a firearms dealer for a violation of section 5855. That section, in close analogy to section 5851, under which petitioner was convicted, states:

> It shall be unlawful for any person who is required to register as provided in section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce.

Forgett was accused of trucking from Wisconsin to Ohio machine guns that he had purchased from another dealer [14] and failed to register under section 5841. Because the transaction was between dealers, the transfers were expressly exempted from requirements

[14] Forgett claimed he was acting as the agent of the Wisconsin dealer. See Petition for Writ of Certiorari *Forgett* v. *United States*, No. 861, October 1965 Term, at p. 5. This claim, if true, would not have changed Forgett's duty to register. But the contention emphasizes the incompleteness of the definition of "transfer" in section 5848(10).

of section 5814(a). When Forgett agreed to take the guns, he came under a duty to register under section 5841. No doubt, he was allowed a reasonable time in which to register.[15] See *Northern Pacific Railway Co.* v. *United States,* 213 Fed. 162 (C.A. 8), affirmed 242 U.S. 190. But until he registered he had a duty to keep any movement of the guns wholly intrastate. Had he registered the guns first, he would not have violated Section 5855, and could have in no manner incriminated himself. See 349 F. 2d at 604.

Even where a weapon has been made or transferred in violation of the Act, it does not necessarily follow that the registration of the owner or the transferee is self-incriminatory. In the case of a making, one person can make a firearm by modifying a weapon that is owned and possessed by another person. In such a case, the owner commits no crime in connection with the making; but if he wishes to continue to possess the weapon after its modification he must register under Section 5841. That registration can in no way incriminate him, but only serves to eliminate any possibility of criminal prosecution.

Nor would a transferee necessarily incriminate himself through registration. The obligation to file and pay tax in advance of transfer is imposed by Section 5814. While the transferee must provide information to be entered on the form, Section 5814(a) makes it "unlawful for any person *to transfer* a firearm" without the written order. Section 5814(b) requires "every

[15] Since Forgett agreed to take the guns two weeks before he had them shipped, he had adequate opportunity to register his possession before his shipper took possession on his behalf.

person so transferring a firearm" to "forward a copy of such order to the" Treasury. Thus the filing obligation is entirely the transferor's and not the transferee's. A transferee could in good faith provide the transferor with all the information required, but the transferor could fail to file, which would impose on the transferee a duty to register. If he did register, he could be convicted of no crime.[16]

Even if it is uncommon for a person to acquire possession of a firearm in a manner not subject to Section 5814(a) or Section 5821(a), such acquisitions do occur, and Section 5841 is intended to apply to them in a manner that would not cause the registrant to incriminate himself in any way. Consequently, the clause in Section 5851 under which petitioner was convicted cannot be deemed unconstitutional on its face.

The registration requirement of Section 5841 also could apply to someone who has acquired a firearm in a manner subject to Section 5814(a) or Section 5821(a), but without complying with the statutory requirements. Such a person would thereby violate that portion of Section 5851 which makes it

[16] Another pertinent example arose when a dealer in salvage purchased a large amount of scrap metal from a Navy depot in Utah and found approximately 4,000 Thompson sub-machine guns which by error had not been destroyed before delivery was made. We assume no criminal liability would be incurred by such a purchase, although the guns would have to be destroyed or the guns registered and a tax paid if the buyer wished to retain them legally. Generally speaking a like circumstance could arise whenever a firearm is obtained from a governmental agency, which is not a "person" within the meaning of the Act, see 26 U.S.C. 5848(11), and therefore is not subject to the duties imposed on transferors.

unlawful "to receive or possess any firearm which has at any time been transferred * * * or which has at any time been made in violation of" Section 5814(a) or 5821(a). But this does not mean that a person incriminates himself of such an offense by registering under Section 5841, as he must do if his continuing possession is not to be an additional crime under the clause of Section 5851 that was applied to petitioner.

Registration shows only possession. It does not prove, or lead in any obvious or general way to evidence of, an acquisition or making where the transferor or maker failed to comply with Section 5814(a) or Section 5821(a). It may well be that registration of a firearm of which the Treasury has previously received no notice will stimulate an investigation that will produce evidence that the registrant or some prior possessor made or received the gun in violation of the Act. But since the government would have the burden of showing how the making or transfer occurred in a prosecution for receipt or possession of a weapon transferred or made unlawfully, and since it is possible to acquire or make a gun in a circumstance that does not require compliance with the provisions of Section 5814(a) or 5821(a), the registration does not even show that the making or an acquisition was in some way unlawful.

Even if registration leads the government to the other evidence necessary to establish an unlawful acquisition or making, it does not follow that the registration compelled self-incrimination in the Constitutional sense. We submit that such a situation is sufficiently similar to *United States* v. *Sullivan*, 274

U.S. 259, to warrant applying the *Sullivan* rationale here. *Sullivan* holds that the Fifth Amendment does not excuse the filing of an income tax return where the source of the income was an unlawful activity. This Court ruled "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." *Id.* at 263. Therefore Sullivan was entitled to refuse to disclose the source of his income, although he could not "refuse to state the amount of his income because it had been made in crime." *Id.* at 264. Yet, a refusal to state the source of income may well suggest to the tax collector that the taxpayer has engaged in criminal conduct, and thus could lead the government to evidence of unlawful activity, just as could the filing of a firearm registration under Section 5841. See, generally, Mansfield, *The Albertson case: Conflict Between the Privilege Against Self-Incrimination and the Government Need for Information,* 1966 S. Ct. Rev. 103, 114–119.

Sullivan was different from the present case to the extent that "the questions in the income tax return were * * * directed at the public at large * * *", *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79, whereas the National Firearms Act applies to the relatively small group of people who wish to possess guns that fall within the definition of firearms in 26 U.S.C. 5848(1). But the mere fact that there are a greater number of people subject to the filing requirements of the income tax law does not

mean that those persons subject to the overall reporting requirements of the National Firearms Act incur a greater probability of incrimination through compliance than the public at large does in filing income tax returns. There are those, such as Sullivan, who cannot comply with the income tax requirements without incurring some risk of incrimination. But any person who wants to possess a firearm can find a lawful way to do so that does not incriminate him. The registration form—Form 1—used under Section 5841 (Pet. Br. 29 App. B) in fact requires no information that is not called for in Form 1A and Form 4, which, respectively, are used for the declaration of intent to make a firearm pursuant to Section 5821(c), and upon a transfer of a firearm under Section 5814(a).[17] There has been no claim that either of these forms is inherently incriminating. If anything, Form 1 asks for less information than the other two, since it does not ask disclosure of the manner of making or acquisition. Although Form 1 asks the date of acquisition, a registrant presumably could rely on the Fifth Amendment in refusing to provide that date. This case is much like *Sullivan* in that a failure to register "would make the taxpayer rather than a tribunal the final arbiter of the claim" of privilege. 382 U.S. at 79. As this Court pointed out in *Sullivan,* such a result would unnecessarily allow a taxpayer to draw "a conjurer's circle around the whole matter." 274 U.S. at 264.

We recognize that two courts of appeals and two

[17] Copies of Forms 1A and 4 are attached to this Brief as Appendices A and B respectively.

district courts have taken the view that a registration under Section 5841 is necessarily incriminating. *Russell* v. *United States*, 306 F. 2d 402, 408 (C.A. 9), so held, on the assumption that every person who registers a firearm under Section 5841 "thereby admits * * * that he did not acquire or make it in compliance with section 5851 [*sic*]." *Russell* was followed in *Dugan* v. *United States*, 341 F. 2d 85 (C.A. 7); *McCann* v. *United States*, 217 F. Supp. 751 (D. Colo.); and *United States* v. *Fleish*, 227 F. Supp. 967 (E.D. Mich.). The Fifth Circuit has indicated its agreement with those holdings. See *Lovelace* v. *United States*, 357 F. 2d 306 (C.A. 5); *Haynes* v. *United States* (R. 13). In those cases the government did not present the overall view of the National Firearms Act set forth above. Doubtless, this failure materially contributed to the conclusions reached. We point out, however, that when these arguments were presented, in *United States* v. *Forgett, supra*—a case where the record demonstrated that the registration requirement of Section 5841 can, and is intended to, apply in situations where no incrimination can possibly result—the court recognized that registration need not admit criminality. See 349 F. 2d at 604.

Nor, once the *Russell* construction of Section 5841 is rejected, is there anything to petitioner's reliance on such cases as *Albertson* v. *Subversive Activities Control Board, supra*. *Albertson* involved the statutory requirements that persons register their affiliation with the Communist Party, which was found an invalid infringement of the Fifth Amendment privilege. In so ruling this Court rested its decision on the fact

that the registration requirement was "directed at a highly selective group inherently suspect of criminal activities" (p. 79). But we understand the "criminal activities" of which Albertson and like persons were "inherently suspect" to refer to the one fact that registration would admit—membership in the Communist Party. For this Court stated (p. 77):

> Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act, 18 U.S.C. § 2385 (1964 ed.), or under § 4(a) of the Subversive Activities Control Act, 64 Stat. 991, 50 U.S.C. § 783(a) (1964 ed.), to mention only two federal criminal statutes. *Scales* v. *United States*, 367 U.S. 203, 211. Accordingly, we have held that mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege. * * *

Here, the fact that would be admitted by registration is possession of a firearm. Such possession is not a federal crime. As we have acknowledged, it may well result in an inquiry as to whether the registrant has complied with other provisions of law. So much is inherent in virtually every tax or regulatory scheme which depends upon the device of record-keeping and self-reporting. But, as *Sullivan* shows, that is not of itself sufficient to establish that a tax or regulatory measure offends the Fifth Amendment.

Nor is this a case in which registration would itself show a violation of state law. Texas, the State where petitioner was charged to have possessed a modified shotgun, and many other states, do not forbid such

possession.[18] While 18 states, including Texas,[19] do prohibit the possession of machine guns, which are firearms within the meaning of the National Firearms Act, the others either restrict no more than the possession of concealed weapons, or limit their regulation of firearms to registration of some firearms or the licensing of dealers.[20]

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[18] Only three states, the District of Columbia and the Virgin Islands have such an explicit prohibition. See Calif. Penal Code § 12020; D.C. Code tit. 22, § 3214; Smith-Hurd Ill. Ann. Stat. tit. 38, S. 24–1; N.Y. Penal Code §§ 1896, 1897(3). Virgin Is. Code Ann. §§ 23–453. However, some of the statutes from states other than Texas cited in footnote 19, *infra*, define "machine gun" in a manner that would include some types of modified shotguns.

[19] See Conn. Gen. Stat. Ann. tit. 53, § 202; Del. Code Ann. tit. 11, § 465; Rev. Laws of Haw. (1955) § 157.8; Burns Ind. Stat. tit. 10, § 4712; Ia. Code Ann. § 696.1; Kans. Stat. Ann. tit. 21, § 2601; La. Rev. Stat. tit. 40, § 1752; Minn. Stat. Ann., § 609.67; Vernon's Ann. Mo. Stat. § 564.590; Rev. Stat. of Nebr. (1943, Re-issue of 1956) tit. 28, § 1010; N. Jer. Stat. Ann. 2A, § 151–50; Gen. Stat. of N. Car. tit. 14, § 409; Oreg. Rev. Stat. §§ 166.250(1), 166.410; Purdon's Penna. Stat. Ann. tit. 18, § 4629; Gen. Laws of R.I. (1956) § 11–47–8; Code of Laws of S. Car. (1962) tit. 16, § 123; Tex. Penal Code §§ 489b, 489c; Rev. Code Wash. Ann. § 9.41.190.

[20] See Code of Ala. (1958) tit. 14, §§ 161 to 165; Alaska Comp. Stat. Ann. § 65–12–1; Ariz. Rev. Stat. Ann. tit. 13, § 911; Ark. Stat. Ann. (1947) tit. 41, §§ 4507 to 4517; Ark. Stat. Ann. (1947) tit. 41, §§ 4507 to 4513; Colo. Rev. Stat. (1963) §§ 40–11–1, 40–11–10; Fla. Stat. Ann. §§ 790.01 to 790.24; Code of Ga. Ann. §§ 26–5101 to 26–5112; Kent. Rev. Stat. (1953) § 435.230; Me. Rev. Stat. Ann. §§ 15–391 to 15–393, 25–2031; Ann. Code of Md. (1957) §§ 27–372 to 27–383; Mich. Stat. Ann. (1962) §§ 28.91 to 28.100; Miss. Code Ann. (1942) §§ 2079 to 2086; Rev. Codes of Mont. (1947) §§ 94–3525 to 94–3527; Nev. Rev. Stat. §§ 202.340 to 202.360; N. Hamp. Rev. Stat. Ann. (1965) § 585.26; N. Mex. (1953) §§ 40A–7–1 to 40A–7–3; N. Dak. Cent. Code Ann. §§ 62–02–01 to 62–02–07; Page's Ohio Rev. Code Ann. §§ 2923.01 to 2923.05; Okla. Stat. Ann §§ 1272 to 1280; Oreg. Rev. Stat. §§ 166.210 to 166.470; S. Dak. Code of 1939 § 13.1609; Tenn. Code Ann. §§ 39–4901 to 39–4908; Utah Code §§ 76–23–1 to 76–23–7; Vt. Stat. Ann. § 4003; Code of Va. §§ 18.1–

II. ASSUMING THAT A REGISTRATION UNDER SECTION 5841 NECESSARILY INCRIMINATES THE REGISTRANT, THE FIFTH AMENDMENT NONETHELESS PERMITS PROSECUTION FOR POSSESSION OF A FIREARM THAT "HAS NOT BEEN REGISTERED AS REQUIRED BY SECTION 5841"

In this portion of our brief we assume *arguendo* that the reading given Section 5841 in *Russell* and like cases is correct—that registration under Section 5841 necessarily admits "an actual or presumptive violation of law." 306 F. 2d at 409. Making that assumption, we would concede that, if the charge against petitioner under Section 5851 were in substance a charge that he possessed a gun which *he* had failed to register, the Fifth Amendment would forbid his conviction, unless this court adopts the use-restriction rule we suggest in the last part of this brief. The court below so held in *Lovelace* v. *United States, supra.* But in our view the charge against petitioner is that he possessed a gun that *no one* had registered before he acquired it.

That this is the crime defined by Section 5851 seems to follow from the language of Section 5851 itself. The act stated to be unlawful is "to possess any firearm which *has not been* registered as required by Section 5841". (Emphasis added.) The language is in the past tense. It necessarily refers to registration before the accused acquired possession of the gun. Indeed, if it were read as referring to the accused's failure to register, the clause would be merely dupli-

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258 to 18.1–268, PC 483 to 489C; W. Va. Code §§ 61–7–1 to 61–7–8; West's Wisc. Stat. Ann. §§ 164.01 to 164.20, 941.20 to 941.23; Wyo. Stat. (1958) §§ 6–237 to 6–246.

cative of Section 5841. Moreover, this portion of Section 5851 omits the phrase "at any time," found in the clauses relating to possession of guns transferred or made in violation of the Act. The obvious purpose is to inhibit traffic in firearms of which the tax collector has no notice and therefore has never had the opportunity to keep track of for purposes of discovering taxable transactions. The government, in a case such as this, therefore has the burden of proving that there has never been registration under Section 5841. We believe that the government must go further, and prove that it has not secured notice of the existence of the gun through either Section 5814 or 5821. Otherwise, there would be no proof that Section 5841 ever required registration.

Thus there was no need to charge that petitioner failed to register. Nor does the information make that charge. Indeed, such a charge would not be encompassed within Section 5851, for it would have the inherent defect of failing to allege that the gun had never been registered before petitioner obtained it. Petitioner's offense was therefore not failure to register; it was his continuing possession of a modified shotgun that no one had registered. His acquisition of the gun may or may not have been unlawful. But it was open to him, before he acquired the gun or within a reasonable time thereafter, to determine whether the government had in any way received notice of its existence. His offense was his continued possession of the gun when its existence had never been reported to

the Treasury. As was said of the defendant in *Starks* v. *United States*, 316 F. 2d 45, 46 (C.A. 9),

> "It is the possession of a gun that no one has registered, not the failure by appellant to register, that is the essence of the offense * * *. Appellant did not have to accept or acquire possession of the gun, and *when he did so, that gun not having been registered by any one, the offense was complete.*" * * * [Emphasis supplied.]

At most, therefore, petitioner is arguing that he is immune from prosecution because some prior possessor of the gun could not have registered it without having incriminated himself. The assumed invalidity of Section 5841 would not make it impossible, as petitioner contends (Br. 14–15), for the government to show that someone had the opportunity to take action that would not have been self-incriminating. However the gun was made, the maker had the opportunity to comply with Section 5821, or the record keeping and reporting requirements imposed upon manufacturers. If the maker was a manufacturer, the first transferor to a transferee who was not subject to the occupational tax had the opportunity to comply with Section 5814. Accordingly, the maker or one transferor at the least had the opportunity to provide the government with notice of the existence of the gun without incriminating himself, and in a way that would have made petitioner's prosecution impossible. For, as we have indicated above, if any notice had been given under Section 5814 or Section 5821 the charge against petitioner could not

stand, because the government would have been unable to prove that registration had ever been required under Section 5841.

This consideration apart, petitioner at best would be resting his constitutional claim on a violation of another's constitutional rights in circumstances where the other person is unknown and his liability to prosecution is entirely hypothetical. We question whether the protection of these unknown persons requires that petitioner be immune from prosecution, even though he voluntarily acquired a gun that had never been registered or brought to the government's notice. Every court of appeals that has considered this issue has concluded, as we argue, that the potential infringement of that other person's constitutional rights is so remote that it does not warrant a prohibition upon the prosecution of someone in petitioner's position. See, in addition to the decision below, *Pruitt* v. *United States*, 364 F. 2d 826 (C.A. 6); *Decker* v. *United States*, 378 F. 2d 245 (C.A. 6); *Sipes* v. *United States*, 321 F. 2d 174 (C.A. 8), certiorari denied, 375 U.S. 913; *Frye* v. *United States*, 315 F. 2d 491 (C.A. 9); *Starks* v. *United States*, *supra*; *Taylor* v. *United States*, 333 F. 2d 721 (C.A. 10); *Castellano* v. *United States*, 350 F. 2d 852 (C.A. 10), certiorari denied, 383 U.S. 949. We consider it particularly persuasive, that with only one exception, this conclusion has been reached in every jurisdiction where Section 5841 has been ruled invalid. Thus, the Ninth Circuit, in *Frye* and *Starks*, distinguished *Russell*. The opinion below distinguished *Lovelace* (R. 13–15). *Taylor* cited, 333 F. 2d at 722, the district court opinions in *McCann*,

and *United States* v. *Mares,* 208 F. Supp. 550 (D. Colo.), but distinguished them along with *Russell.* In like manner *Pruitt* and *Decker* found *United States* v. *Fleisch, supra,* inapplicable. We similarly urge this Court to hold that any conflict with the Fifth Amendment is too remote to warrant invalidation of Section 5851, even if Section 5841 is deemed unconstitutional.

III. ASSUMING THAT A REGISTRATION UNDER SECTION 5841 INCRIMINATES THE REGISTRANT AND THAT A CHARGE UNDER SECTION 5851 THEREBY INFRINGES ON THE PRIVILEGE ~~FAILURE TO REGISTER~~, THE PROPER REMEDY WOULD BE TO RESTRICT THE USE OF INFORMATION OBTAINED THROUGH THE REGISTRATION.

In *Marchetti* v. *United States,* No. 2, this Term, *Grosso* v. *United States,* No. 12, this Term, and *Costello* v. *United States,* No. 41, October Term, 1966, we have argued that if this Court rules that the registration provisions of the wagering tax statutes are incriminatory the proper remedy would be to bar the use of information gained through the registration in a prosecution for wagering, rather than to sanction a failure to register. We submit that the present case would be an equally appropriate instance for the application of such a use-restriction rule; rather than repeat them at length, we adopt by reference here the arguments made in our *Marchetti, Grosso,* and *Costello* briefs.

The registration at issue here serves the interest of the federal government in determining the identity and location of firearms that have, in the past, or may in the future, become subject to the excises

imposed by the National Firearms Act. If this Court's view is that the registration provisions of Section 5841 require the registrant to admit a failure to comply with other portions of the Act, and that a prosecution under Section 5851 thereby infringes on the privilege ~~iture to register~~, we would urge that the Court should nonetheless refrain from a ruling that would forbid such prosecutions and thus make it impossible for the tax collector to obtain information that is unavailable except through Section 5841 registrations. The alternative remedy—a ruling that neither a registration under Section 5841 nor the information secured from such a registration may be used in a prosecution for a failure to comply with other provisions of the National Firearms Act (such as the other clauses of Section 5851 or the advance notice requirements of Section 5814 and Section 5821)—would avoid any possibility of a registrant's own words being used in any manner to convict him. It would at the same time permit the Treasury to obtain the information needed for effective administration of the tax provisions of the National Firearms Act.[21]

[21] We believe that affirmance should result if the Court declines to accept our position that Section 5851 is not incriminatory, but does accept our suggested use-restriction approach. The decisions on point, see p. 30, *supra*, had all upheld Section 5851, so that petitioner cannot contend he had reason to believe his conduct was constitutionally protected. See our briefs of last Term in *Costello* (pp. 25–26) and *Grosso* (pp. 28–29).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.
FRED M. VINSON, JR.
Assistant Attorney General.
HARRIS WEINSTEIN,
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Attorneys.

SEPTEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

APPENDIX A

FORM **IA** (FIREARMS)
(REV. SEPT. 1964)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

DECLARATION OF INTENT TO MAKE A FIREARM

(Chapter 53, Internal Revenue Code)

(Execute in DUPLICATE. Read INSTRUCTIONS on page 3 carefully before completing form)

THE FOLLOWING ITEMS WILL BE COMPLETED BY DECLARANT

The undersigned hereby declares his intention to make a firearm as required by Section 5821 of the Internal Revenue Code.

1. DATE

2. NAME AND ADDRESS OF DECLARANT *(Type or print name of individual or firm - number, street, city or town, State, Zip code)*.

A $200.00 "NATIONAL FIREARMS ACT" stamp may be obtained from your DISTRICT DIRECTOR OF INTERNAL REVENUE and must be securely affixed by the maker in this space and canceled by writing his initials and the date thereon in ink. When completed, this declaration in duplicate must be transmitted to the DIRECTOR, ALCOHOL AND TOBACCO TAX DIVISION, INTERNAL REVENUE SERVICE, WASHINGTON, D. C., 20224.

3. NAME AND ADDRESS OF EXECUTIVE OFFICER IF APPLICANT IS OTHER THAN AN INDIVIDUAL

4. HAVE YOU BEEN CONVICTED OF A FELONY? ☐ YES ☐ NO

5. KIND OF FIREARM *(Machine gun, submachine gun, shotgun or rifle, muffler or silencer, etc.)*

6. LENGTH OF BARREL *(Inches)*	7. MODEL	8. CALIBER OR GAUGE	9. SERIAL NUMBER

10. OTHER MARKS OF IDENTIFICATION	11. NAME AND LOCATION OF ORIGINAL MANUFACTURER OF FIREARM *(If prototype, furnish plans and specifications)*

12. WHAT IS YOUR OBJECT IN SEEKING TO MAKE THE FIREARM?

I declare under the penalties of perjury that the firearm is being made for a lawful purpose and that the answers given in response to questions 3 to 12 inclusive are, to the best of my knowledge and belief, true, correct, and complete.

13. SIGNATURE OF DECLARANT	14. TITLE OR STATUS *(Individual member of firm, if officer of corporation, give title)*

Information called for in items 18 thru 20 on reverse of this form must be furnished, unless declarant is other than an individual.

DO NOT WRITE IN THIS SPACE

15. THE DECLARATION OF INTENT TO MAKE THE FIREARM DESIGNATED HEREIN HAS BEEN EXAMINED AND THE MAKING OF THE FIREARM IS

☐ APPROVED ☐ DISAPPROVED FOR THE FOLLOWING REASON:

16. DATE	17. SIGNATURE *(Director, Alcohol and Tobacco Tax Division)*

18. FINGERPRINTS *(Under no circumstances will this declaration be considered without individual's fingerprints):*

The fingerprints must be clear for accurate classification and should be taken before someone properly equipped to take them.

The declaration must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, that he is satisfied that the fingerprints and photograph appearing on the declaration are those of the person intending to make the firearm, and that no information is available which would indicate that the declarant will use the firearm for other than lawful purposes.

No forms will be approved where the fingerprints are smudged. **NOTE AMPUTATIONS WHERE APPLICABLE.**

1—Right thumb	2—Right forefinger	3—Right middle finger	4—Right ring finger	5—Right little finger
6—Left thumb	**7—Left forefinger**	**8—Left middle finger**	**9—Left ring finger**	**10—Left little finger**

Plain impression of the four fingers taken simultaneously - LEFT HAND	Left thumb	Right thumb	Plain impression of the four fingers taken simultaneously - RIGHT HAND

AFFIX PHOTOGRAPH HERE (APPROX. 2" X 2")

19. IMPORTANT NOTICE

Before your declaration can be considered, it will be necessary that you securely attach to each copy thereof, in the space provided therefor, an unmounted individual photograph of yourself taken within one year of the date of this declaration. Proofs, indistinct pictures, tintypes, or group photographs will not be accepted. Photographs must at all times remain securely attached to each copy of the declaration.

20. DATE OF BIRTH *(Month, day and year)*

21. I hereby certify that the fingerprints and photograph hereon are those of the declarant and I have no information which would indicate that the declarant will use the firearm for other than lawful purposes.

DATE	SIGNATURE AND TITLE	ORGANIZATION AND ADDRESS

INSTRUCTIONS

1. Firearm.—The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barfel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition. (Sec. 5848(1), I. R. C.)

2. Machine Gun.—The term "machine gun" means any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger. (Sec. 5848(2), I. R. C.)

3. Muffler or Silencer.—The term "muffler" or "silencer" includes any device for silencing or diminishing the report of any portable weapon, such as a rifle, carbine, pistol, revolver, machine gun, submachine gun, shotgun, fowling piece, or other device from which a shot, bullet, or projectile may be discharged by an explosive, and is not limited to mufflers or silencers for "firearms" as defined in section 5848 of the Internal Revenue Code.

4. Rate of tax for making a firearm.—The tax upon the making of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) is $200. (Sec. 5821(a), I. R. C.)

5. Preparation of the declaration of intent to make a firearm and payment of tax.—Pursuant to section 5821 of the Internal Revenue Code, and except as otherwise provided, every person seeking to make a firearm must make a declaration on this form, in duplicate, for each firearm. If the maker is an individual, he shall affix his fingerprints, attach to each copy of the declaration an individual photograph of himself taken within one year prior to the date of such declaration, and furnish all other data required on the declaration. Upon completion of the declaration there must be affixed by the person proposing to make the firearm a $200 "National Firearms Act" stamp in the proper space, and cancel such stamp by writing his initials and the date thereon in ink. Both copies of the declaration must then be forwarded to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C., 20224.

6. Disposition of declaration of intent to make a firearm.—If approved, the Director will return the original copy, with stamp affixed, to the maker of the firearm and will retain the duplicate. The maker of the firearm shall not, under any circumstances, make the firearm until the approved declaration is received from the Director. The original declaration must be retained by the applicant and be available at all times for inspection by Government officers until such time as the firearm may be subsequently transferred.

7. Exemptions from use of declaration of intent to make a firearm.—Pursuant to section 5821 (b) of the Internal Revenue Code, manufacturers who have registered and paid special tax provided for in section 5801 (a) of the Code, persons making a firearm from another firearm with respect to which tax has been paid, prior to such making, under section 5821(a) of the Code and persons making a firearm for the use of (a) the United States Government, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or (b) any peace officer or any Federal officer designated by regulations of the Secretary, shall not be required to file a declaration of intent to make a firearm or required to pay tax to make such firearm, but should consult the applicable regulations to ascertain what reports are required.

8. Procedure where firearm is not made.—In the event that a declaration to make a firearm is executed and stamp affixed and thereafter such intent is abandoned and the firearm is not made, the maker may file a claim on Form 843 for redemption of the stamp with the District Director of Internal Revenue for his district. Such claim must be accompanied by the declaration to which the stamp is affixed.

9. Penalties.—Any person who violates or fails to comply with any of the requirements of Chapter 53 of the Internal Revenue Code shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than 5 years, or both, in the discretion of the court. Moreover, any firearm involved in any violation of the provisions of Chapter 53 of the Internal Revenue Code or any regulations promulgated thereunder shall be subject to seizure and forfeiture.

10. Scope of tax on making a firearm.—The provisions of section 5821 of the Internal Revenue Code relating to the making of a firearm are applicable to persons within the States of the United States, and the District of Columbia.

APPENDIX B

FORM 4 (FIREARMS)
(REV. AUG. 1963)

U. S. TREASURY DEPARTMENT – INTERNAL REVENUE SERVICE

APPLICATION AND ORDER FOR TRANSFER OF FIREARM

(Chapter 53, Internal Revenue Code)

(Execute in duplicate. Read instructions carefully before completing form.)

THE FOLLOWING ITEMS WILL BE COMPLETED BY APPLICANT

The undersigned hereby makes application for the transfer of a firearm to him as required by Section 5814 of the Internal Revenue Code.

1. DATE

2. NAME *(Individual (include trade name, if any), trust, estate, partnership, association, company, or corporation)*

3. ADDRESS *(Number, street, city or town, zone, State)*

4. NAME AND ADDRESS OF PERSON AUTHORIZED TO EXECUTE THIS APPLICATION IF APPLICANT IS OTHER THAN AN INDIVIDUAL

5. HAVE YOU BEEN CONVICTED OF A FELONY? ☐ YES ☐ NO

I declare under the penalties of perjury that the firearm is being purchased for a lawful purpose and that the answers given in response to questions 2 to 5 inclusive are, to the best of my knowledge and belief, true, correct, and complete.

6. SIGNATURE OF APPLICANT

7. TITLE OR STATUS *(Individual, member of firm, if officer of corporation, give title)*

Information called for in items 20, 21 and 22 on reverse must be furnished, unless applicant is other than an individual.

THE FOLLOWING ITEMS WILL BE COMPLETED BY PERSON DESIRING TO TRANSFER THE FIREARM

8. KIND OF FIREARM *(Machine gun, submachine gun, shotgun or rifle, muffler or silencer, or any other weapon, etc.)*

9. LENGTH OF BARREL *(Inches)*	10. MODEL	11. CALIBER OR GAUGE	12. SERIAL NUMBER

13. OTHER MARKS OF IDENTIFICATION	14. NAME AND ADDRESS OF MANUFACTURER OF FIREARM *(If known)*

15. NAME AND ADDRESS OF TRANSFEROR *(Print or type name of firm or individual) (Number, street, city or town, zone, State)*

A $5.00 or $200.00 "NATIONAL FIREARMS ACT" stamp may be obtained from your DISTRICT DIRECTOR OF INTERNAL REVENUE and must be securely affixed by the transferor in this space and canceled by writing his initials and the date thereon in ink. When completed, this order form in duplicate must be transmitted to the DIRECTOR, ALCOHOL AND TOBACCO TAX DIVISION, INTERNAL REVENUE SERVICE, WASHINGTON 25, D. C.

16. BY *(Signature)*

17. TITLE OR STATUS *(Individual member of firm, if officer of corporation, give title. If special-tax payer, give registry number)*

DO NOT WRITE IN THIS SPACE

THE APPLICATION AND ORDER FORM HAS BEEN EXAMINED AND THE TRANSFER OF THE FIREARM DESIGNATED HEREIN IS

☐ APPROVED

☐ DISAPPROVED FOR THE FOLLOWING REASON:

18. DATE

19. SIGNATURE *(Director, Alcohol and Tobacco Tax Division)*

FORM 4 (FIREARMS) (REV. 8-63)

20. FINGERPRINTS (under no circumstances will this application be considered without individual's fingerprints):

The fingerprints must be clear for accurate classification and should be taken before someone properly equipped to take them.

The application must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant, and that he has no information which would indicate that the applicant will use the firearm for other than lawful purposes.

No order forms will be accepted where the fingerprints are smudged. **NOTE AMPUTATIONS WHERE APPLICABLE.**

1—Right thumb	2—Right forefinger	3—Right middle finger	4—Right ring finger	5—Right little finger

6—Left thumb	7—Left forefinger	8—Left middle finger	9—Left ring finger	10—Left little finger

Plain impression of the four fingers taken simultaneously LEFT HAND	Left thumb	Right thumb	Plain impression of the four fingers taken simultaneously RIGHT HAND

AFFIX PHOTOGRAPH HERE (APPROX. 2" X 2")

21. IMPORTANT NOTICE

Before your application can be considered, it will be necessary that you securely attach to each copy thereof, in the space provided therefor, an unmounted individual photograph of yourself taken within one year of the date of this application. Proofs, indistinct pictures, tintypes, or group photographs will not be accepted. Photographs must at all times remain securely attached to each copy of the application.

22. DATE OF BIRTH *(Month, day and year)*

23. I hereby certify that the fingerprints and photograph hereon are those of the applicant, and I have no information which would indicate that the applicant will use the firearm for other than lawful purposes.

DATE	SIGNATURE AND TITLE	ORGANIZATION AND ADDRESS

INSTRUCTIONS

1. PREPARATION OF APPLICATION AND ORDER FOR TRANSFER OF FIREARM AND PAYMENT OF TAX.—It is preferred that this form be prepared by use of a typewriter, using carbon paper to make an exact duplicate. Pen and ink may be used, but under no circumstances may a lead pencil be used. Pursuant to section 5814 of the Internal Revenue Code, and except as otherwise provided, every person seeking to obtain a firearm must make a separate application, in duplicate, for each firearm on this form to the transferor. If the applicant is an individual, he shall affix his fingerprints, attach to each copy of the application an individual photograph of himself taken within one year of the date of such application, and furnish all other data required on the form. The transferor must furnish the information called for on the form relating to the identification of the firearm. Upon completion of the form by the applicant and the transferor, the latter will affix a $5 or $200 "National Firearms Act" stamp, on the original form only, in the proper space, and cancel such stamp by writing his initials and the date thereon in ink. If any questions arise concerning the preparation of this form please contact the nearest Alcohol and Tobacco Tax Office of the Internal Revenue Service.

2. DISPOSITION OF APPLICATION AND ORDER FOR TRANSFER OF FIREARM.—The transferor will forward both copies of the form to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D. C. If approved, the Director, Alcohol and Tobacco Tax Division, will return the original to the transferor for delivery to the applicant, with the firearm, and will retain the duplicate. The transferor shall not, under any circumstances, deliver the firearm to the applicant until the approved form, with the "National Firearms Act" stamp attached, is received from the Director, Alcohol and Tobacco Tax Division. The form must be retained by the transferee and be available at all times for inspection by Government officers until such time as the firearm may be subsequently transferred. If the application and order form is disapproved, the original with the "National Firearms Act" stamp affixed thereto will be returned to the transferor.

3. PROCEDURE WHERE FIREARM IS NOT TRANSFERRED.—In the event that the form is executed and stamp affixed without the transfer of the firearm being made, the transferor may file a claim on Form 843 for the redemption of the stamp with the District Director of Internal Revenue for his district. Such claim must be accompanied by the form to which the stamp is affixed.

4. PROCEDURE WHERE FIREARM IS TO BE SUBSEQUENTLY TRANSFERRED.—Where a firearm is to be subsequently transferred, a new application and order form covering such proposed transfer must be filed with the Director, Alcohol and Tobacco Tax Division.

5. RATE OF TAX ON THE TRANSFER OF A FIREARM.—The tax on the transfer of any firearm is $200: Except, that the transfer tax on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848(5), shall be at the rate of $5. (Sec. 5811(a), I.R.C.)

6. DEFINITIONS.—

(A) Felony—Any offense punishable by death or imprisonment for a term exceeding one year.

(B) Firearm—The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition. (Sec. 5848(1), I.R.C.)

7. SCOPE OF TAX ON THE TRANSFER OF A FIREARM.—The provisions of section 5814 of the Internal Revenue Code relating to the application and order forms are applicable to persons within the States of the United States and the District of Columbia.

8. WARNING.—It shall be unlawful for any person who has not in his possession a stamp-affixed order (Form 4 (Firearms)) as provided in section 5814 of the Internal Revenue Code to ship, carry, or deliver any firearm in interstate commerce. (Sec. 5855, I.R.C.)

9. PENALTIES.—ANY PERSON WHO VIOLATES OR FAILS TO COMPLY WITH ANY OF THE REQUIREMENTS OF CHAPTER 53 OF THE INTERNAL REVENUE CODE SHALL, UPON CONVICTION, BE FINED NOT MORE THAN $2,000 OR BE IMPRISONED FOR NOT MORE THAN 5 YEARS, OR BOTH, IN THE DISCRETION OF THE COURT. MOREOVER, ANY FIREARM INVOLVED IN ANY VIOLATION OF THE PROVISIONS OF CHAPTER 53 OF THE INTERNAL REVENUE CODE OR ANY REGULATIONS PROMULGATED THEREUNDER SHALL BE SUBJECT TO SEIZURE AND FORFEITURE.

SUPREME COURT OF THE UNITED STATES

No. 236.—October Term, 1967.

Miles Edward Haynes, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 29, 1968.]

Mr. Justice Harlan delivered the opinion of the Court.

Petitioner was charged by a three-count information filed in the United States District Court for the Northern District of Texas with violations of the National Firearms Act. 48 Stat. 1237. Two of the counts were subsequently dismissed upon motion of the United States Attorney. The remaining count averred that petitioner, in violation of 26 U. S. C. § 5851, knowingly possessed a firearm, as defined by 26 U. S. C. § 5848 (1), which had not been registered with the Secretary of the Treasury or his delegate, as required by 26 U. S. C. § 5841. Petitioner moved before trial to dismiss this count, evidently asserting that § 5851 violated his privilege against self-incrimination, as guaranteed by the Fifth Amendment.[1] The motion was denied, and petitioner thereupon entered a plea of guilty.[2] The judgment of conviction was affirmed by the Court of Appeals for the Fifth Cir-

[1] Petitioner's motion asserted merely that § 5851 was "unconstitutional," and the order denying the motion does not indicate more precisely the substance of petitioner's contentions. His subsequent arguments, both in the courts below and here, have, however, consistently asserted a claim of the constitutional privilege. No suggestion is made by the Government that the claim of privilege was not sufficiently made.

[2] Petitioner's plea of guilty did not, of course, waive his previous claim of the constitutional privilege. See, *e. g.*, *United States* v. *Ury*, 106 F. 2d 28.

cuit. 372 F. 2d 651. We granted certiorari to examine the constitutionality under the Fifth Amendment of petitioner's conviction. 388 U. S. 908. For reasons which follow, we reverse.

I.

Section 5851[3] forms part of the National Firearms Act, an interrelated statutory system for the taxation of certain classes of firearms. The Act's requirements are applicable only to shotguns with barrels less than 18 inches long; rifles with barrels less than 16 inches long; other weapons, made from a rifle or shotgun, with an overall length of less than 26 inches; machine guns and other automatic firearms; mufflers and silencers; and other firearms, except pistols and revolvers, "if such weapon is capable of being concealed on the person . . . ." 26 U. S. C. § 5848 (1); Treas. Reg. § 179.20. These limitations were apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subjected to taxation.[4]

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[3] The section provides that "It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812 (b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."

[4] The views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress. See *Rainwater* v. *United States*, 356 U. S. 590, 593; *United States* v. *Price*, 361 U. S. 304, 313. Nonetheless, it is pertinent to note that the Committee on Ways and Means of the House of Representatives, while reporting in 1959 on certain proposed amendments to the Act, stated that the "primary purpose of [the Firearms Act] was to make it more difficult for the gangster element to obtain certain types of weapons. The types of weapon with which these provisions are

Importers, manufacturers, and dealers in such firearms are obliged each year to pay special occupational taxes, and to register with the Secretary of the Treasury or his delegate. 26 U. S. C. §§ 5801, 5802. Separate taxes are imposed on the making and transfer of such firearms by persons other than those obliged to pay the occupational taxes 26 U. S. C. §§ 5811, 5821. For purposes of these additional taxes, the acts of making and transferring firearms are broadly defined. Section 5821 thus imposes a tax on the making of a firearm "whether by manufacture, putting together, alteration, any combination thereof, or otherwise." Similarly, to transfer encompasses "to sell, assign, pledge, lease, loan, give away, or otherwise dispose of" a firearm. 26 U. S. C. § 5848 (10).

All these taxes are supplemented by comprehensive requirements calculated to assure their collection. Any individual who wishes to make a weapon, within the meaning of § 5821 (a), is obliged, "prior to such making," to declare his intention to the Secretary, and to provide to the Treasury his fingerprints and photograph. 26 U. S. C. § 5821 (e); Treas. Reg. § 179.78. The declaration must be "supported by a certificate of the local chief of police . . . or such other person whose certificate may . . . be acceptable . . . ." Treas. Reg. § 179.78. The certificate must indicate satisfaction that the fingerprints and photograph are those of the declarant, and that the firearm is intended "for lawful purposes." *Ibid.* Any person who wishes to transfer such a weapon may lawfully do so only if he first obtains a written order from the prospective transferee on an "application form issued . . . for that purpose by the Secretary." 26 U. S. C. § 5814 (a). The application, supported by a certificate of the local chief

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concerned are the types it was thought would be used primarily by the gangster-type element." H. R. Rep. No. 914, 86th Cong., 1st Sess., 2.

of police, and accompanied by the transferee's fingerprints and photograph, must be approved by the Secretary prior to the transfer. Treas. Reg. §§ 179.98, 179.99. Finally, every person possessing such a firearm is obliged to register his possession with the Secretary, unless he made the weapon, or acquired it by transfer or importation, and the Act's requirements as to transfers, makings, and importations "were complied with." 26 U. S. C. § 5841.[5]

Failure to comply with any of the Act's requirements is made punishable by fines and imprisonment. 26 U. S. C. § 5861. In addition, § 5851 creates a series of supplementary offenses; it declares unlawful the possession of any firearm which has "at any time" been transferred or made in violation of the Act's provisions, or which "has not been registered as required by section 5841." Finally, § 5851 provides that in prosecutions conducted under that section "possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."

II.

At the outset, it must be emphasized that the issue in this case is not whether Congress has authority under the Constitution to regulate the manufacture, transfer, or possession of firearms; nor is it whether Congress may

[5] The section provides that "Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with."

tax activities which are, wholly or in part, unlawful. Rather, we are required to resolve only the narrow issue of whether enforcement of § 5851 against petitioner, despite his assertion of the privilege against self-incrimination, is constitutionally permissible. The questions necessary for decision are two: first, whether petitioner's conviction under § 5851 is meaningfully distinguishable from a conviction under § 5841 for failure to register possession of a firearm; and second, if it is not, whether satisfaction of petitioner's obligation to register under § 5841 would have compelled him to provide information incriminating to himself. If, as petitioner urges, his conviction under § 5851 is essentially indistinguishable from a conviction premised directly upon a failure to register under § 5841, and if a prosecution under § 5841 would have punished petitioner for his failure to incriminate himself, it would follow that a proper claim of privilege should have provided a full defense to this prosecution.[6] To these questions we turn.

III.

The first issue is whether the elements of the offense under § 5851 of possession of a firearm "which has not been registered as required by section 5841" differ in any significant respect from those of the offense under § 5841 of failure to register possession of a firearm. The United States contends that the two offenses, despite the similarity of their statutory descriptions, serve entirely different purposes, in that the registration clause of § 5851 is intended to punish acceptance of the possession of a firearm which, despite the requirements of § 5841, was never registered by any prior possessor, while § 5841 punishes

[6] Indeed, so much is recognized by the Government; it has stated that "[w]e concede that if petitioner's reading of the two provisions were right . . . petitioner's conviction under Section 5851 would not be valid." Brief for the United States 8.

only a present possessor who has failed to register the fact of his own possession. If this construction is correct, nothing in a prosecution under § 5851 would turn on whether the present possessor had elected to register; his offense would have been complete when he accepted possession of a firearm which no previous possessor had registered. We need not determine whether this construction would be free from constitutional difficulty under the Fifth Amendment, for we have concluded that § 5851 cannot properly be construed as the United States has urged.[7]

The United States finds support for its construction of § 5851 chiefly in the section's use of the past tense: the act stated to be unlawful is "to possess any firearm which *has not been* registered as required by section 5841." (Emphasis added.) It is contended that we may infer from this choice of tense that the failure to register must necessarily precede the accused's acquisition of possession. We cannot derive so much from so little. We perceive no more in the draftsman's choice of tense than the obvious fact that the failure to register must precede the moment at which the accused is charged; we find nothing which confines the clause's application to failures to register which have occurred before a present possessor received the firearm. It follows that the phrase fastened upon by the United States is, at the least,

[7] The Government's position is generally supported by several cases in the courts of appeals. See, in addition to the opinion below, *Frye* v. *United States*, 315 F. 2d 491; *Starks* v. *United States*, 316 F. 2d 45; *Mares* v. *United States*, 319 F. 2d 71; *Sipes* v. *United States*, 321 U. S. 174; *Taylor* v. *United States*, 333 F. 2d 721; *Castellano* v. *United States*, 350 F. 2d 852; *Pruitt* v. *United States*, 364 F. 2d 826; *Decker* v. *United States*, 378 F. 2d 245. None of these cases, however, undertook an extended examination of the relationship between §§ 5851 and 5841. Compare *Lovelace* v. *United States*, 357 F. 2d 306, 309; and Mansfield, The Albertson Case, 1966 Sup. Ct. Rev. 103, 158–159, n. 95.

equally consistent with the construction advanced by petitioner.

If, however, nothing further were available, it might be incumbent upon us to accept the Government's construction in order to avoid the adjudication of a serious constitutional issue. See, *e. g.*, *Ashwander* v. *Valley Authority*, 297 U. S. 288, 348; *Crowell* v. *Benson*, 285 U. S. 22, 62. But there are persuasive indications at hand which, in our view, preclude adoption of the position urged by the United States. Initially, we must note that each of the other two offenses defined by § 5851 indicates very specifically that the violations of the making or transfer provisions, on which the § 5851 offenses are ultimately premised, can have occurred "at any time." An analogous phrase in the registration clause would have made plain beyond all question that the construction now urged by the United States should be accepted; if this was indeed Congress' purpose, it is difficult to see why it did not, as it did in the other clauses, insert the few additional words necessary to make clear its wishes. The position suggested by the United States would thus oblige us, at the outset, to assume that Congress has, in this one clause, chosen a remarkably oblique and unrevealing phrasing.

Similarly, it is pertinent to note that the transfer and making clauses of § 5851 punish the receipt, as well as the possession, of firearms; the registration clause, in contrast, punishes only possession. Under the construction given § 5851 by the United States, Congress might have been expected to declare unlawful, in addition, the receipt of firearms never previously registered; indeed, the receipt of the firearm is, under that construction, the central element of the offense. Congress' preference in the registration clause for "possession," rather than "receipt," is satisfactorily explicable only if petitioner's construction of § 5851 is adopted.

Third, and more important, we find it significant that the offense defined by § 5851 is the possession of a firearm which has not been registered "as required by section 5841." In the absence of persuasive evidence to the contrary, the clause's final words suggest strongly that the perimeter of the offense which it creates is to be marked by the terms of the registration requirement imposed by § 5841. In turn, § 5841 indicates quite precisely that "[e]very person possessing a firearm" must, unless excused by the section's exception, register his possession with the Secretary or his delegate. Moreover, the Treasury regulations are entirely unequivocal; they specifically provide that "[e]very person in the United States possessing a firearm (a) not registered *to him*, . . . must execute an application for the registration of such firearm . . . ." Treas. Reg. § 179.120. (Emphasis added.)

The pertinent legislative history offers additional assistance, and points against the Government's construction. The registration clause was inserted into § 5851 by the Excise Tax Technical Changes Act of 1957. 72 Stat. 1428. The two committee reports indicate, in identical terms,[8] that the existing section was thought inadequate because, although it defined as an unlawful act the possession of any firearm which had been made or transferred in violation of the Firearms Act, it failed "to so define the possession of an unregistered firearm." H. R. Rep. No. 481, 85th Cong., 1st Sess., 195; S. Rep. No. 2090, 85th Cong., 2d Sess., 212. The section as amended "specifically defines such possession of an unregistered firearm an an unlawful act." *Ibid.* It is useful to note that the committees did not suggest that the failure to register

[8] The language in the reports was evidently taken without change or elaboration from the recommendations submitted to the House Committee on Ways and Means by the Treasury. See Hearings before House Committee on Ways and Means on Excise Tax Technical and Administrative Problems, 84th Cong., 1st Sess., 185, 211.

must have preceded the acquisition of possession. Further, the reports indicate that the proposed amendment was intended to make available in prosecutions for possession of an unregistered firearm the presumption already contained in § 5851; they conclude that the "primary purpose of this change is to simplify and clarify the law and to aid in prosecution." H. R. Rep. No. 481, *supra*, at 196; S. Rep. No. 2090, *supra*, at 212.

We infer that the amendment was thought to have two purposes. First, it would complete the series of supplementary offenses created by § 5851, by adding to those premised on a making or transfer one bottomed on a failure to register. Second, it would facilitate the prosecution of failures to register by permitting the use of the presumption included in § 5851. It would thus "aid in prosecution" of conduct also made unlawful by § 5841. Both these purposes are fully consistent with the construction of § 5851 urged by petitioner; but only the first offers any support to the position suggested by the United States.

We are unable to escape the conclusion that Congress intended the registration clause of § 5851 to incorporate the requirements of § 5841, by declaring unlawful the possession of any firearm which has not been registered by its possessor, in circumstances in which § 5841 imposes an obligation to register. The elements of the offenses created by the two sections are therefore identical. This does not, however, fully resolve the question of whether any hazards of incrimination which stem from the registration requirement imposed by § 5841 must be understood also to inhere in prosecutions under § 5851. Two additional distinctions between the offenses have been suggested, and we must examine them.

First, it has been said that the offenses differ in emphasis, in that § 5851 chiefly punishes possession, while § 5841 punishes a failure to register. Cf. *Frye* v. *United*

States, supra, at 494; *Castellano* v. *United States, supra,* at 854. We find this supposed distinction entirely unpersuasive, for, as we have found, the possession of a firearm and a failure to register are equally fundamental ingredients of both offenses. Second, it has been suggested that § 5841 creates a "status of unlawful possession" which, if assumed by an individual, denies to him the protection of the constitutional privilege. *Castellano* v. *United States, supra,* at 854. It has evidently been thought to follow that the privilege may be claimed in prosecutions under § 5841, but not in those under § 5851. This is no less unpersuasive; for reasons discussed in *Marchetti* v. *United States,* decided today, *ante,* p. ——, we decline to hold that the performance of an unlawful act, even if there exists a statutory condition that its commission constitutes a waiver of the constitutional privilege, suffices to deprive an accused of the privilege's protection. We hold that petitioner's conviction under the registration clause of § 5851 is not properly distinguishable from a conviction under § 5841 for failure to register, and that both offenses must be deemed subject to any constitutional deficiencies arising under the Fifth Amendment from the obligation to register.

IV.

We must now consider whether, as petitioner contends, satisfaction of his obligation to register would have compelled him to provide information incriminating to himself.[9] We must first mark the terms of the registration requirement. The obligation to register is conditioned

[9] We note that § 5841 has several times been held to require incriminating disclosures, in violation of the Fifth Amendment privilege against self-incrimination. See *Russell* v. *United States,* 306 F. 2d 402; *Dugan* v. *United States,* 341 F. 2d 85; *McCann* v. *United States,* 217 F. Supp. 751; *United States* v. *Fleish,* 227 F. Supp. 967. See also *Lovelace* v. *United States, supra,* at 309.

simply upon possession of a firearm, within the meaning of § 5848 (1). Not every possessor of a firearm must, however, register; one who made the firearm, or acquired it by transfer or importation, need not register if the Act's provisions as to transfers, makings, and importations "were complied with." If those requirements were not met, or if the possessor did not make the firearm, and did not acquire it by transfer or importation, he must furnish the Secretary of the Treasury with his name, address, the place where the firearm is usually kept, and the place of his business or employment. Further, he must indicate his date of birth, social security number, and whether he has ever been convicted of a felony. Finally, he must provide a full description of the firearm. See 26 U. S. C. § 5841; Treas. Reg. § 179.120; Internal Revenue Service Form 1 (Firearms).

The registration requirement is thus directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements, and who therefore are immediately threatened by criminal prosecutions under §§ 5851 and 5861. They are unmistakably persons "inherently suspect of criminal activities." *Albertson* v. *SACB*, 382 U. S. 70, 79. It is true, as the United States emphasizes, that registration is not invariably indicative of a violation of the Act's requirements; there are situations, which the United States itself styles "uncommon," [10] in which a possessor who has not violated the Act's other provisions is obliged to register.[11] Nonetheless, the correlation between obliga-

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[10] In particular, the United States emphasizes the position of a finder of a lost or abandoned firearm. Brief for the United States 20.

[11] We must note, however, that certain of these prospective registrants might be threatened by prosecution under state law for possession of firearms, or similar offenses. It is possible that such persons would be obliged, if they registered in compliance with

tions to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution. Moreover, he can reasonably fear that the possession established by his registration will facilitate his prosecution under the making and transfer clauses of § 5851. In these circumstances, it can scarcely be said that the risks of criminal prosecution confronted by prospective registrants are "remote possibilities out of the ordinary course of the law," *Heike* v. *United States,* 227 U. S. 131, 144; yet they are compelled, on pain of criminal prosecution, to provide to the Secretary both a formal acknowledgement of their possession of firearms, and supplementary information likely to facilitate their arrest and eventual conviction. The hazards of incrimination created by the registration requirement can thus only be termed "real and appreciable." *Reg.* v. *Boyes,* 1 B. & S. 311, 330; *Brown* v. *Walker,* 161 U. S. 599–600.

We are, however, urged by the United States, for various disparate reasons, to affirm petitioner's conviction. It is first suggested that the registration requirement is a valid exercise of the taxing powers, in that it is calculated merely to assure notice to the Treasury of all taxable firearms. We do not doubt, as we have

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§ 5841, to provide information incriminating to themselves. Such hazards would, of course, support a proper claim of privilege. See *Malloy* v. *Hogan,* 378 U. S. 1. For illustrations of state statutes under which such prosecutions might occur, see Conn. Gen. Stat. Rev. Ann. § 53–202 (1958); Del. Code Ann. § 11:465 (1953); Hawaii Rev. Laws § 157.8 (1955); Iowa Code Ann. § 696.1 (1950); Kan. Gen. Stat. Ann. § 21–2601 (1964); La. Rev. Stat. § 40:1752 (1951); Minn. Stat. Ann. § 609.67 (1964); N. J. Stat. Ann, Tit. 2A, § 151–50 (1953). We have discovered no state statute under which the present petitioner might have been subject to prosecution for acts registrable under § 5841, and he has not contended that registration would have incriminated him under state law.

repeatedly indicated,[12] that this Court must give deference to Congress' taxing powers, and to measures reasonably incidental to their exercise; but we are no less obliged to heed the limitations placed upon those powers by the Constitution's other commands. We are fully cognizant of the Treasury's need for accurate and timely information, but other methods, entirely consistent with constitutional limitations, exist by which such information may be obtained. See generally *Counselman* v. *Hitchcock*, 142 U. S. 547, 585. See also *Adams* v. *Maryland*, 347 U. S. 179; *Murphy* v. *Waterfront Commission*, 378 U. S. 52. Accordingly, nothing we do today will prevent the effective regulation or taxation by Congress of firearms.

Nonetheless, these statutory provisions, as now written, cannot be brought within any of the situations in which the Court has held that the constitutional privilege does not prevent the use by the United States of information obtained in connection with regulatory programs of general application. See *United States* v. *Sullivan*, 274 U. S. 259; *Shapiro* v. *United States*, 335 U. S. 1. For reasons given in *Marchetti* v. *United States*, *supra*, and *Grosso* v. *United States*, *supra*, we have concluded that the points of significant dissimilarity between these circumstances and those in *Shapiro* and *Sullivan* preclude any proper application of those cases here. The questions propounded by § 5841, like those at issue in *Albertson*, *supra*, are "directed at a highly selective group inherently suspect of criminal activities"; they concern, not "an essentially non-criminal and regulatory area of inquiry," but "an area permeated with criminal statutes." 382 U. S., at 79. There are, moreover, no records or other documents here to which any "public aspects" might

[12] See, for example, *Sonzinsky* v. *United States*, 300 U. S. 506; *Marchetti* v. *United States*, *supra*.

reasonably be said to have attached. Compare *Shapiro* v. *United States, supra,* at 34; and *Marchetti* v. *United States, supra.*

The United States next emphasizes that petitioner has consistently contended that §§ 5841 and 5851 are unconstitutional on face; it urges that this contention is foreclosed by the inclusion in the registration requirement of situations in which the obligation to register cannot produce incriminating disclosures. We recognize that there are a number of apparently uncommon circumstances in which registration is required of one who has not violated the Firearms Act; the United States points chiefly to the situation of a finder of a lost or abandoned firearm.[13] Compare *United States* v. *Forgett,* 349 F. 2d 601. We agree that the existence of such situations makes it inappropriate, in the absence of evidence that the exercise of protected rights would otherwise be hampered, to declare these sections impermissible on face. Instead, it appears, from the evidence now before us, that the rights of those subject to the Act will be fully protected if a proper claim of privilege is understood to provide a full defense to any prosecution either for failure to register under § 5841 or, under § 5851, for possession of a firearm which has not been registered.

Finally, we are asked to avoid the constitutional difficulties which we have found in §§ 5841 and 5851 by imposing restrictions upon the use by state and federal authorities of information obtained as a consequence of the registration requirement. We note that the provisions of 26 U. S. C. § 6107 [14] are applicable to the special

[13] Again, we note that these registrants might be confronted by hazards of prosecution under state law, and that those hazards might support a proper claim of privilege. See n. 11, *ante.*

[14] Section 6107 provides that "In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have

occupational taxes imposed by § 5801, although not, apparently, to the making and transfer taxes imposed by §§ 5811 and 5821. In these circumstances, we decline, for reasons indicated in *Marchetti, supra,* and *Grosso, supra,* to impose the restrictions urged by the United States.

We hold that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under § 5841 or for possession of an unregistered firearm under § 5851.

V.

It remains only to determine the appropriate disposition of this case. Petitioner has seasonably and consistently asserted a claim of privilege, but the courts below, believing the privilege inapplicable to prosecutions under § 5851, evidently did not assess the claim's merits. It would therefore ordinarily be necessary to remand the cause to the District Court, with instructions to examine the merits of the claim. We note, however, that there can be no suggestion here that petitioner has waived his privilege, and that, moreover, the United States has conceded that petitioner's privilege against self-incrimination must be found to have been impermissibly infringed if his contentions as to the proper construction of §§ 5851 and 5841 are accepted. Brief

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paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon the application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged." The special taxes to which the section refers include those imposed by 26 U. S. C. § 5801.

for the United States 8. Accordingly, the District Court would be obliged in any additional proceeding to conclude that "there is reasonable ground to apprehend danger to the witness from his being compelled to answer." *Reg.* v. *Boyes, supra,* at 330. It follows that any proceeding in the District Court must inevitably result in the reversal of petitioner's conviction. We have plenary authority under 28 U. S. C. § 2106 to make such disposition of the case "as may be just under the circumstances." See *Yates* v. *United States,* 354 U. S. 298, 327–331; *Grosso* v. *United States, supra.* It would be neither just nor appropriate to require the parties and the District Court to commence an entirely needless additional proceeding. Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 236.—October Term, 1967.

Miles Edward Haynes, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 29, 1968.]

Mr. Chief Justice Warren, dissenting.

For reasons stated in my dissent in *Marchetti* v. *United States* and *Grosso* v. *United States, ante, p.* —, I cannot agree with the result reached by the Court in this case.